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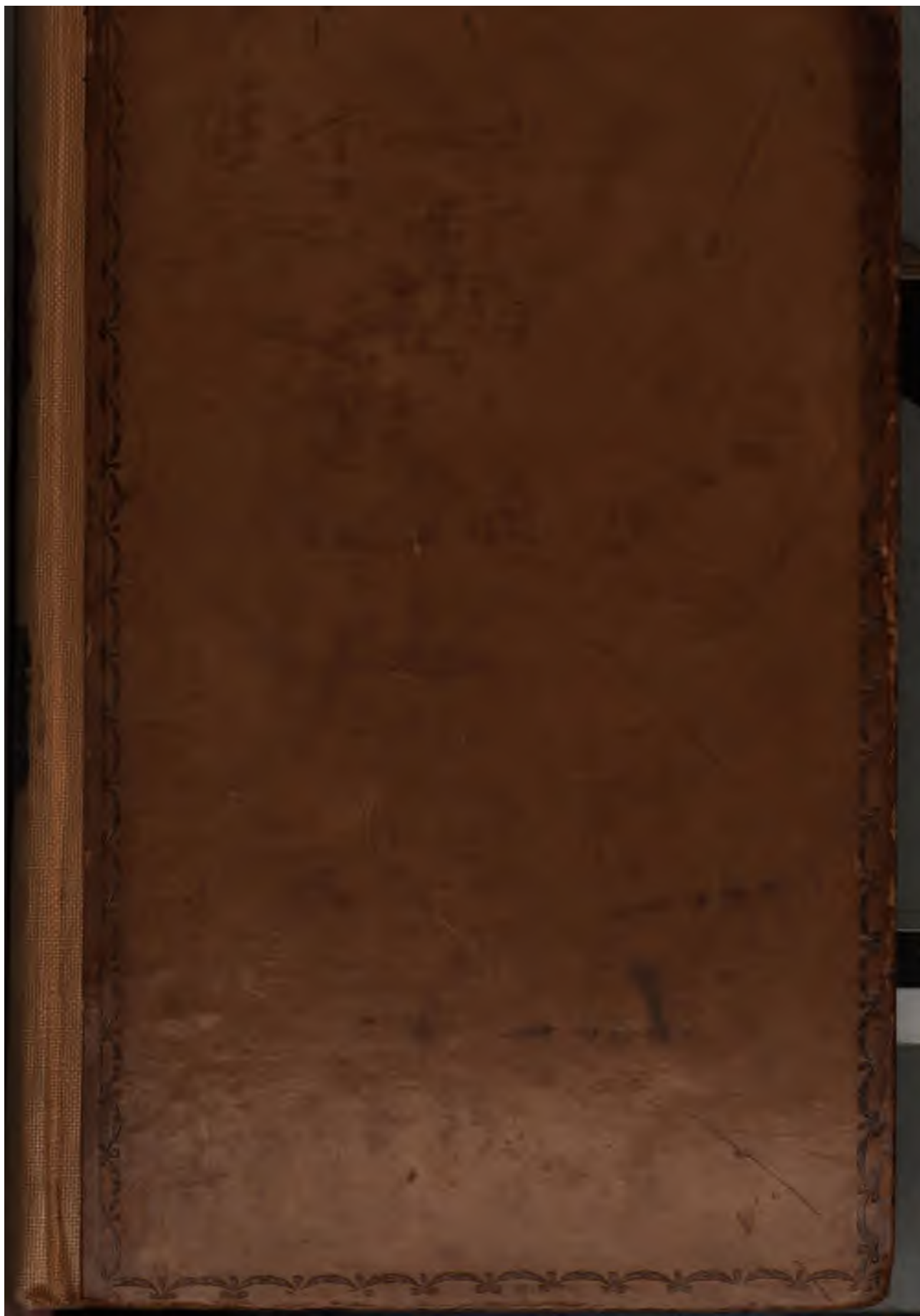
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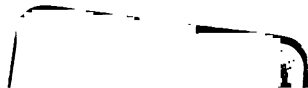


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R E P O R T S
OF
C A S E S,
DETERMINED
AT NISI PRIUS,
IN THE COURTS OF
KING'S BENCH AND COMMON PLEAS,
AND ON THE CIRCUIT,
FROM THE
Sittings after MICHAELMAS TERM, 55 Geo. III. 1814.
TO THE
Sittings after MICHAELMAS TERM, 57 Geo. III. 1816.
INCLUSIVE.

By THOMAS STARKIE, Esquire,
OF LINCOLN'S INN, BARRISTER AT LAW.

— Verum
Credite me vobis folium recitare Sibyllæ.

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1817.



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ARGUED AND RULED
AT NISI PRIUS
IN THE COURTS OF
KING'S BENCH AND COMMON PLEAS.

By THOMAS STARKIE, Esq.
OF LINCOLN'S INN, BARRISTER AT LAW.

VOL. I. PART I.

••• These Reports are in continuation of Mr. Campbell's.

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CASES

ARGUED AND DECIDED

AT

NISI PRIUS

IN K. B.

At the Sittings after Michaelmas Term,

54 GEORGE III.

SITTINGS AFTER TERM AT GUILDHALL.

BOSANQUET and Others v. DUDMAN.

1814.

THIS was an action by the plaintiffs as indorsees of a bill of exchange, drawn and indorsed by *Rains*, and accepted by the defendant.

When a banker's acceptances exceed the cash balance in his hands, he holds collateral securities for value.

Clarkson and Co., who kept a banking account with the plaintiffs, bankers in *London*, had deposited the bill with the latter as a collateral security, but were the holders of the bill on the 5th of *February* 1812, when it became due; at that time the plaintiffs had accepted bills to a much larger amount than the cash balance, in favour of *Clarkson and Co.*, but held collateral securities to a considerable amount. The bill in question, when due, was dishonoured and returned to *Clarkson and Co.*,

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who

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 BOSANQUET
 and Others
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 DUDMAN.

who remitted it to the plaintiffs, requesting them to hold it and to place it to their account when paid, but no credit was given to *Clarkson and Co.* by the plaintiffs on account of the bill. The plaintiffs held the bill from *February 1812* till *February 1813*. *Clarkson and Co.* then became bankrupts, and no application was made to the defendant to pay the bill till *July 1814*.

Scarlett for the defendant cross-examined as to the amount of the plaintiffs' acceptances on the account of *Clarkson and Co.*, compared with the cash balance and collateral securities in their hands.

But Lord ELLENBOROUGH said, that he should hold that, whenever the acceptances exceeded the cash balance, the plaintiffs held all the collateral bills for value.

And he may recover against the acceptor of an accommodation bill (deposited with him as a collateral security before it became due), although the party who deposited the bill had it in his hands when it became due, and has re-

ceived satisfaction from the drawer.

It was then contended, that the plaintiffs did not hold the bill as a security, but merely as the agents of *Clarkson and Co.*; and it was proposed to prove that whilst the bill was in the hands of *Clarkson and Co.* they knowing that it was a mere accommodation bill as between *Rains* and *Dudman*, after the dishonour requested *Rains* to take it up, and afterwards bought a ship from *Rains*, in part payment for which the bill was to have been delivered up, instead of which it was afterwards re-delivered to the defendants.

But

But Lord ELLENBOROUGH was of opinion, that when the bill was returned to the plaintiffs they recurred to their former rights and that the right to sue upon the bill could only be extinguished by a payment by the acceptor.

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BOSANQUET
and Others
v.
DUDMAN.

Verdict for the plaintiff.

Scarlett and Wray, for the defendant.

[Attornies, *Karslake and Holt*.]

PRESTON v. BUTCHER.

THIS was an action against the defendant, a wine merchant and distiller, for refusing to retain the plaintiff in his service, in breach of his agreement.

A contract for a yearly service at a specific salary must be proved as alleged, although both the time and sum are averred under a *vide licet*.

The 1st count of the declaration stated, that in consideration that the plaintiff at the special instance and request of the defendant, had agreed to enter into his service for the sum of 250*l. per annum*, &c., the defendant undertook, &c.

The 2d count stated, that the defendant undertook to pay a certain salary, TO WIT, the salary of 250*l. per annum*.

1814.

PRESTON

v.

BUTCHER.

The 3d count was similar to the 2d, except that it omitted the *videlicet*.

The plaintiff had been for many years in the service of Mr. *De Franca*, a wine merchant in *London*, latterly at a salary of 200*l. per annum*, and in consequence of the flattering prospect held out to him by the defendant, had quitted Mr. *De Franca* and had entered into the defendant's service in *Suffolk*. It was understood between the parties that the plaintiff was to be a gainer by the exchange; that he was to have the use of a house and garden, but there was no proof of an express agreement for any specific salary or time of service.

Brougham for the defendant contended, that the plaintiff must be nonsuited, since there was no proof of an agreement for the specific salary mentioned in the 1st and 3d counts, and that though the precise sum in the 2d count was laid under a *videlicet*, the introduction of the *videlicet* would not relieve the plaintiff from proving the contract as stated.

For the plaintiff it was contended, that the words *certain salary*, as used in the 2d count, did not mean an *ascertained salary*, and that the word *certain* did not in common acceptation import a definite object or sum; that if the words *certain salary* meant an *ascertained salary*, the subsequent words would be superfluous, that the whole effect
of

of the words was the same as if it had stood thus,
 “ for a certain salary,” and that there was evi-
 dence for the jury that some salary was agreed for,
 though the sum was not ascertained.

1814.

PRESTON
 v.
 BUTCHER.

Lord ELLENBOROUGH was of opinion, that the
 special counts were defective, both because they
 alleged that a *specific* salary was agreed upon; and
 also because they stated that the contract was for
 an annual service.

It appeared that the plaintiff had remained in
 the defendant’s service for three weeks, but the
 declaration contained no count for work and
 labour.

It was then contended, that the plaintiff was
 entitled to recover for the expences incurred by
 removing into *Suffolk*, for the purpose of entering
 into the defendant’s service, as for money paid to
 the use of the defendant; but ultimately the case
 was referred to arbitration.

The *Attorney General* and *Scarlett*, for the
 plaintiff.

Brougham and *Jones*, for the defendant.

[Attornies, *A. Clarke* and *Kearsey*]

1814.

JORDAINE v. CORNWALL and Others.

Goods having been detained by a foreign power are afterwards restored — as between the assurer and the assured — a yielding up of the goods *quasi in integro* is to be considered as a restoration, notwithstanding some spoliation during the detention.

THE defendants effected an insurance with the plaintiff, an underwriter, on goods consigned to *Russia*. The vessel, upon her arrival in *Russia*, having been detained by order of the *Russian* government, the plaintiff paid the amount of his subscription upon an undertaking by the defendants, that if the property should be restored, the plaintiff should be placed in the same situation. There was no abandonment. The declaration averred, that the property had been restored, but that the defendants had refused to place the plaintiff in the same situation.

The cause was ultimately referred to arbitration, but a doubt having previously arisen what should be considered to be a restoration of the goods,

LORD ELLENBOROUGH held, that if, whilst the goods were in the possession of the *Russian* government, they were guilty of a spoliation, yet a subsequent yielding up of the goods *quasi in integro* was to be considered for the purpose of this action as a restoration.

[Attornies, *Kaye & Co.* and *Dennetts & Co.*]

DE LA TORRE v. BARCLAY and SALKELD.

1814.

THIS was an action by the plaintiff as the indorsee of two foreign bills of exchange, against the defendants as the drawers. Plea, the general issue and the *statute of limitations*.

A qualified admission by a party who relies on an objection, which would at any time have been a good defence to the action, does not take a case out of the statute of limitations. An agreement between the holder and the acceptor of a bill (dishonoured for non-payment), that the acceptor shall pay to the holder the amount of the bill, and no more, discharges the drawer, although his assignees (he being then a bankrupt) are parties to such agreement.

To take the case out of the statute, the plaintiff gave in evidence a conversation which passed between the defendant and *Mr. Wadeson* within six years before the action brought, in which the defendant said, "If you had presented the protest the same as the rest, it would have been paid. "I had then funds in the acceptor's hands."

Lord ELLENBOROUGH was of opinion, that as this was a qualified admission, in which the defendant resisted payment on an objection which would have exempted him from payment, the law would not, under the circumstances imply a new promise.

But on further inquiry, it turned out that the defendants' objection did not relate to the want of protest upon the first dishonour of the bill, but to the want of protest on the bill's being refused payment on a subsequent presentment at the defendants' request.

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DE LA
TORRE

v.

BARCLAY
and
SALKELD.

Upon this explanation, Lord ELLENBOROUGH was of opinion that the answer amounted to an admission of liability, since a second protest was perfectly gratuitous and unnecessary.

It afterwards appeared, that in 1803 *Barclay and Salkeld* became bankrupts, and that an agreement was entered into between the plaintiff, the assignees of *Barclay and Co.*, and *O'Brien* the acceptor, which recited the drawing of the bill, the acceptance, that the plaintiff had become the holder for value, and that it would probably be sent back for non-payment; and by which *O'Brien* agreed with the assignees and with the plaintiff to pay the amount of the bill, provided he should not be called upon to pay more.

The *Attorney General*, for the plaintiff, contended, that though such an agreement entered into without the knowledge of the drawer, would discharge him, yet that in this case, since the assignees were parties, it amounted to nothing more than an agreement to resort to the acceptor in the first instance, but not to discharge the drawer.

But Lord ELLENBOROUGH was of opinion, that this new agreement, by which the condition of the acceptor was varied, amounted to a waiver of the right of action against the defendants, who were represented by their assignees; — and the plaintiff was

Nonsuited.

[Attornies, *Wiltshire & Co.* and *Bourdillon.*]

WYMER v. PAGE.

1814.

THIS was an action for not accepting a conveyance on a title which the plaintiff in his declaration alleged, and the defendant in his plea denied, to be marketable.

An attorney may be appointed, for the purpose of suffering a recovery of copyhold lands, as of common right, unless there be an express custom to the contrary.

The case came on upon admissions, from which it appeared that the estate in question was copyhold, and that it was the custom of the manor to admit upon a surrender of copyhold premises for the purpose of suffering a recovery. The only question was, whether a party could appoint an attorney for the purpose of suffering a recovery. It was stated, that there was no express custom to that effect.

Lord ELLENBOROUGH was of opinion, that such an appointment might be made by the common law as of common right, unless there was an express custom to the contrary.

Abbott contended, that in inferior courts it was not of course to appoint an attorney.

Lord ELLENBOROUGH. — I think the point too plain to be reserved, the Court would think I heaped cases upon them.

Leave, however, was given to move if he thought the point arguable.

Scarlett, for the plaintiff.

Abbot, for the defendant.

[*Attornies, Justice and Barber.*]

CASES

ARGUED AND DECIDED

AT

NISI PRIUS

IN K. B.

At the Sittings after Easter Term,

55 GEORGE III.

SITTINGS AFTER TERM AT WESTMINSTER.

1815.

GAUNT *v.* HILL.

A written proposal to pay a moiety of the debt of another, if the creditor will at a specified time of meeting accept the proposal and discharge the debtor, is not binding unless the creditor accede to the terms in writing.

ASSUMPSIT for non-payment of 70*l.* in consideration of forbearance. The defendant's brother being indebted to the plaintiff in the sum of 140*l.*, suffered judgment to go by default. After which the defendant wrote to the plaintiff the following letter.

" Sir,

" That it may not be said that I have made no
" effort to save my brother from prison ; I wish to
" know if you will give him a full discharge if I will
" pay one moiety of his debt. I have specified
" what

“ what I will pay and no more ; if you will accept
 “ this, call upon me to-morrow morning.”

1815.

GAUNT

v.

HILL.

This letter was not dated, but the post mark upon it bore date the 28th of *March*. In order to shew that the plaintiff had acceded to this offer, he read a letter sent by him to the defendant on the 4th of *April*, in which, after remonstrating with the defendant for not paying one moiety according to his offer, he says, “ I have taken an
 “ opinion on your letter, and am informed that I
 “ can recover upon it against you, therefore I
 “ shall not proceed against your brother.”

Lord ELLENBOROUGH was of opinion that the defendant's letter was a mere proposition to pay a moiety, reserving a power to do any thing or nothing as he pleased the next day, and that at all events it would be necessary to shew, that the plaintiff had acceded to the proposal in writing.

Plaintiff nonsuited.

Jervis for the plaintiff.

Abbott for the defendant.

[Attornies, *Gaunt* and *Taylor*.]

1815.

INMAN v. STAMP.

An agreement to occupy lodgings at a yearly rent, payable in quarterly portions, (the occupation to commence on a future day,) is an agreement relating to an interest in land, within the meaning of the fourth section of the statute of frauds.

ASSUMPSIT for not occupying the plaintiff's lodgings pursuant to the defendant's undertaking. For the plaintiff it appeared in evidence, that the defendant had verbally agreed to take apartments in his house, to be entered upon at *Christmas*, at the annual rent of 26*l.* to be paid quarterly, and that upon the strength of this agreement, the plaintiff had taken down the advertisement of lodgings from his window. On the 24th of *December*, the day before he was to have taken possession of the lodgings, the defendant announced to the plaintiff his determination to recede from his bargain.

LORD ELLENBOROUGH was of opinion that this was a contract for an interest in land, within the meaning of the fourth section of the statute of frauds, and therefore that the agreement was void, but held that it would have been otherwise, if the defendant had entered upon the premises, since that would have been a part-execution of the contract.

Jervis for the plaintiff contended, that the taking down the advertisement at the defendant's request was a part execution.

But

But Lord ELLENBOROUGH was of opinion, that since this was done before the time had arrived for taking possession, it made no difference.

1815.

INMAN
v.
STAMP.

Jervis and *Lawes* for the plaintiff.

Reader, for the defendant.

[Attornies, *Toulmin* and *Bromley*.]

RUSSEL v. HEADINGTON.

WRIT of inquiry after judgment by default in an action brought for non-performance of an award.

Qu. Whether an award directing the assignment of an interest to A. B. will warrant an assignment to A. B. his executors, administrators, and assigns?

The award directed that the defendant should assign *according to law*, (a certain interest specified) to one *Duncan* upon request.

It appeared in evidence that the assignment tendered to the defendant, and which he was required to execute, was an assignment to *Duncan*, *his executors, administrators, and assigns*.

Gurney for the defendant objected, that the assignment tendered was larger in its terms than that which was specified in the award, since it was not confined to *Duncan* only, but extended to his *executors, administrators, and assigns*.

Park

1815.

RUSSEL

v.

HEADING-
TON.

Park for the plaintiff contended, that the words "according to law," virtually included his executors, administrators, and assigns.

But Lord ELLENBOROUGH was of opinion, that a personal assignment to *Duncan* himself might be meant, and said he would save the point.

But subsequently upon his Lordship's recommendation, in order to save future expence, the damages were assessed at 10*l.* by consent.

Park for the plaintiff.

Gurney for the defendant.

REDHEAD and Another v. CATOR.

A vessel not actually built in Russia, but repaired there at an expence exceeding two thirds of the whole value, is not of the built

ACTION of assumpsit upon a guarantee by the defendant.

The defendant was the *English* agent of *Nissen and Co. Russian* merchants resident at *Riga*.

of Russia, under the navigation act, although she is so considered by the laws of Russia. — An agent in this country for merchants the sellers of goods in Russia, who guarantees "that the shipment shall be in conformity with the revenue laws of Great Britain, so that no impediment shall arise upon the importation thereof, or that in default, the consequence shall rest with the sellers," makes himself personally responsible to the buyer. In a declaration upon such a guarantee against the agent, it is unnecessary to allege any application for indemnity to the principals.

An impediment arising from non-compliance with the navigation act, is an impediment within the terms of the guarantee.

Such a guarantee is not within the statute of frauds, if the terms of the agreement can be collected from the written correspondence between the parties.

The plaintiffs, through the medium and at the instance of the defendant, gave *Nissen and Co.* an order to send them a large quantity of hemp, and other articles of *Russian* produce, for which they were to be paid by bills upon *Hurry and Co.* bankers in *London*.

1815.
 REDHEAD
 and Another
 v.
 CATOR.

Upon the arrival of the vessel on board of which the goods were sent, she was not suffered to unload, since it had been discovered that she was not a *Russian* built ship, but had been built in *Holstein*, and subsequently repaired in a *Russian* port, and therefore the sending such a ship with *Russian* produce was in violation of the navigation act. The plaintiffs, upon learning that the vessel had been built in *Holstein*, directed *Hurry and Co.* not to accept the bills.

Upon the 13th of *October* 1813, *Cator* wrote to the plaintiffs, proposing a guarantee on the behalf of *Nissen and Co.*, on condition that the plaintiffs would instruct *Hurry and Co.* to honour the bills of *Nissen and Co.* This was rejected by the plaintiffs in their answer of the 27th of *October*, in which they said they could not accede to the proposal of the defendant, or make any other. On the 2d of *November* the defendant wrote the letter which was relied upon by the plaintiffs in support of their action.

“ Gentlemen,

“ On the behalf of *Nissen and Co.* of *Riga*,
 “ I hereby guarantee that the shipment of hemp in
 “ the

1815. “ the *Carolina*, will be found to be in conformity
 { “ with the *revenue* laws of *Great Britain*, so that
 REDHEAD “ no impediment shall arise upon the importation
 and Another “ thereof, or that on default thereof, the conse-
 v. “ quence shall rest with *Nissen and Co.*
 CATOR. “ *WILLIAM CATOR.*”

It appeared that the unloading of the vessel had been stopped, in consequence of her being *Holstein* built and not *Russian*, and that the plaintiffs in consequence had been put to considerable expence.

Scarlett, for the defendant, at first contended, that in order to constitute the vessel a *Russian* vessel, so as to satisfy the navigation act, it was not necessary that she should have been originally built in *Russia*, but that she might be so considered, though she had only been repaired there, and that the test to ascertain this was the amount of the expence of repairing; for by the law of *Russia*, if the repairs of a foreign vessel in a *Russian* port amounted to two-thirds of the whole value, she was considered to be a *Russian* built vessel.

But Lord ELLENBOROUGH was of opinion, that a vessel merely *repaired*, and not *built* in *Russia*, could not be considered as a *Russian* vessel.

Scarlett then contended, that no count in the declaration, was applicable to the present case, since there was none which alleged an application
 by

by the plaintiffs to *Nissen and Co.*, to be indemnified by them for the injury sustained.

1815.

REDHEAD
and Another
v.
CARON.

That the defendant had engaged for *Nissen and Co.* and not for himself, and therefore that he could not be personally liable, except on the refusal of *Nissen and Co.* which had not been alleged.

LORD ELLENBOROUGH. — I think the guarantee is personally binding upon the defendant, since *Nissen and Co.* were liable to answer for their neglect in sending the goods in an improper ship without any guarantee, there being an implied undertaking on the part of every person who sells goods to another, to send them by a proper conveyance; his Lordship, however, saved the point for the future consideration of the Court.

Scarlett further contended, that the undertaking in question was not sufficient to satisfy the statute of frauds upon the authority of *Wain v. Warlters*, 5 *East*; and also that the impediment did not arise from want of conformity with any revenue law, since the navigation act under which the stoppage had taken place was not a revenue law.

With respect to the first point, Lord ELLENBOROUGH was of opinion that the case did not fall within the scope of the decision in *Wain v. Warlters*, and as to the latter, that though the navigation act could not in strictness be considered as a revenue law, yet that the latter words, "so that no

1815. "impediment, &c." extended the guarantee to
the present case.

REDHEAD
and Another
v.
CATOR.

Verdict for the plaintiffs, subject to the opinion
of the Court, on the construction and operation
of the guarantee.

Garrow A. G. for the plaintiff.

Scarlett for the defendant.

Scarlett in the ensuing *Trinity* term, moved for
a rule to shew cause why the verdict for the plain-
tiff should not be set aside, and a nonsuit entered
or the judgment arrested. He submitted,

1. That the undertaking was not *personally*
binding on the defendant.

The obvious meaning of the words he con-
tended, was that *Nissen and Co.* were to answer
for the default and not the defendant, he also
urged, that as the consideration was not mentioned
in the guarantee, it could not be enforced accord-
ing to the doctrine of *Wain v. Warlters*, and that the
terms mentioned in the letter of the 25th of *Octo-
ber*, could not be considered as incorporated with
the guarantee of the 2d of *November*, since they
had been rejected. He also objected, that the
undertaking was illegal, since it was an undertaking
to indemnify the plaintiffs against a violation of
the revenue laws.

2. That

2. That if this could be considered as a guarantee binding on the defendant, the declaration ought to have alleged notice by the plaintiffs to *Nissen and Co.*, and a demand upon them, and a refusal on their part to indemnify the plaintiff, since the undertaking was that *Nissen and Co.* should bear the loss, and therefore it was for the plaintiffs to shew that *Nissen and Co.* had not borne the loss.

1815.
 REDHEAD
 and Another
 v.
 CATON.

But the Court were of opinion, that the obvious meaning of the words was, that the defendant bound himself on behalf of *Nissen and Co.*, and that the plaintiffs could not upon that guarantee have sued *Nissen and Co.*, unless they could have shewn that the latter authorised the guarantee. That the case did not fall within the statute of frauds, since there was sufficient in writing to shew what the consideration really was.

That the undertaking on the part of the defendant was, that no damage should ensue from the default of *Nissen and Co.*, and that it was therefore sufficient for the plaintiffs to allege, that they had been damnified by the default.

Rule refused.

[Attornies, *Boswell* and *Cooper* and *Lowe*.]

COURT OF COMMON PLEAS.

SITTINGS AT WESTMINSTER.

1815.

BIDDLE and LOYD v. EMANUEL LEVY.

Goods are supplied to a minor upon a fraudulent representation by his father, that he is about to relinquish his business in favour of the son, although the credit is given to the son, the father dealing with the proceeds, is responsible in assumpsit for goods sold and delivered.

THIS was an action by the plaintiffs, who were manufacturers of glass at *Birmingham*, against the defendant a trader in *London*, for goods sold and delivered.

The plaintiffs had dealt with the defendant for some time previous to the period when the defendant informed the plaintiffs, that he was about to retire from business, and that his son *Samuel Levy* would succeed him, he added, that he should keep a watchful eye over him, and afterwards introduced him personally to the plaintiffs. Upon this representation the plaintiffs supplied the son *Samuel Levy* with goods to the amount of 800*l.* The plaintiffs contended, that though the credit was given to the son, yet that under the circumstances, the father was liable on the ground that his conduct was fraudulent, the son at the time the goods were supplied being a minor about the age of 17, and that the representation which the father had made was false, and intended for the purpose of evading all responsibility.

GIBBS C. J. in summing up to the jury, informed them, that if the father had falsely represented to the plaintiffs, that he was about to recede from business and place his son in his shoes, in order that the plaintiffs might have no one to resort to who was responsible, he was liable in the present action, whether in fact he had a secret interest conjointly with the son, or the son, contrary to the defendant's representation, had no interest whatsoever in the profits. On the first supposition the defendant would be liable as a co-partner with his son, since he had not pleaded in abatement; on the second he would be liable wholly as principal, having taken into his own hands that fund out of which the creditors, who trusted the son, might naturally expect to be paid.

1815.

BIDDLE
and LOYDv.
LEVY.

His Lordship in conclusion informed the jury, that the whole case turned upon the representation made by the defendant, that if they were of opinion that the representation was false and fraudulent, they ought to find for the plaintiffs, if on the contrary, they believed that it was made *bonâ fide* they should find for the defendant.

Verdict for the plaintiffs.

Best and Pell Serjts. and *Comyn* for the plaintiffs.

Vaughan and Rough Serjts. and *Barnwall* for the defendant.

[Attornies, *Maybew & Co.* and *Isaac.*]

IN THE KING'S BENCH.

1815.

May 17.

LAWRENCE v. OBEE.

A. having recovered damages against B. for driving hold-fasts into A.'s wall, in order to support a nuisance

brings a second action of trespass for the continuance.

Seemle, the form of the second action should be case and not trespass.

THIS was an action of trespass for driving hold-fasts into the wall of the plaintiff's house, for the purpose of supporting a water closet, erected by the defendant close to the outer wall of the plaintiff's house.

It was admitted that the plaintiff had already recovered 40s. damages for the original trespass, and that the damages now sought to be recovered, were for the continuance of the injury complained of.

Lord ELLENBOROUGH C. J. inclined to the opinion, that the form of action should have been case and not trespass. (a)

The cause was referred.

Garrow A. G. for the plaintiff.

Park for the defendant.

[Attornies, *Carlton* and *Jones*.]

(a) *Qu.* whether in such a case it would not be proper to state in the declaration the original trespass, and the special inconvenience which resulted from it, and that the plaintiff had recovered damages in respect of such injury up to such a time, and then to aver that the defendant, from that time down to the period of bringing the second action, had suffered the nuisance to remain to the further damage, &c.

 ADJOURNED SITTINGS IN LONDON.

BRUCE and Others v. HURLY.

1815.

ASSUMPSIT by plaintiffs as the indorsees of a promissory note, dated *May* 19, 1814, made by the defendant for the sum of 500*l.* payable to *Young and Co.* or order, two months after date.

The plaintiffs, bankers in *London*, kept an account with *Young and Co.* bankers at *Taunton*. The note had been indorsed by *Young and Co.*, and placed along with other securities by *Young and Co.* in the hands of *Bruce and Co.*, and had been sent by *Bruce and Co.* on the day before it became due to *Young and Co.* The note was not paid when due, and after the bankruptcy of *Young and Co.* had been found, by their assignees, amongst their papers. In order to shew for what purpose the note had been sent by the plaintiffs to *Young and Co.*, the plaintiffs proposed to read their letter addressed to *Young and Co.* in which the note had been sent.

A. deposits with B. a banker, a promissory note as a security for advances, B. is entitled to recover on the note, although before it became due, he parted with the possession to enable A. to procure payment from the maker, and although the note remained in A.'s hands till his bankruptcy, and then came into the possession of his assignees.

The *Attorney-General* for the defendant objected to this: but,

C 4

Lord

1815.

BRUCE
and Others
v.
HURLY.

Lord ELLENBOROUGH C. J. was of opinion, that if it could be shewn that the letter was the envelope in which the note was sent, it might be read in evidence as a declaration accompanying an act.

The letter (which was then read,) contained an account of other bills and notes, and with respect to the note in question, this expression, “ we send “ you *Hurly's* note.”

The plaintiffs' clerk stated, that he had the custody of the securities deposited in the plaintiff's hands, and that this had been amongst the number. Being asked for what purpose the note in question had been sent back to *Young and Co.*, the question was over-ruled, but he was allowed to state what the plaintiffs' usual course and habit of dealing had been, which was, when a bill or note was nearly due, to send it down to the person from whom they had received it as a security, to procure payment, when the party liable lived in the same neighbourhood. It also appeared, that when the bill was due, *Young and Co.* had over-drawn the amount of their securities in the hands of *Bruce and Co.*

Lord ELLENBOROUGH was of opinion, that there was evidence to shew that the note had been sent down by the plaintiffs to *Young and Co.*, for the purpose of procuring payment :

And the plaintiffs had a verdict.

Park

Park and for the plaintiffs.

1815.

Garrow A. G. and *Gifford* for the defendant.

Brues
and Others
v.
HURRY.

[Attornies, *Scott* and *Senter.*]

GLOSSOP v. COLMAN and Others.

ASSUMPSIT for goods sold and delivered. The defendants were the proprietors of the *Haymarket Theatre*, and the action was brought to recover the amount of oil and other articles, supplied for the use of the theatre.

A father who holds out to the world that his son is his partner, and who sends bills and signs receipts in their joint names, in an action brought in his own name, is not precluded from shewing that his son is not a partner.

The son of the plaintiff was called to prove his case, and upon cross-examination it appeared that at the time when the goods in question were supplied, the plaintiff held out to the world that the son was in partnership with him, and that the father had frequently given receipts in the joint names, that the bills had been made out in the joint names for articles supplied to the theatre, and that the very bill for the articles in question was made out in the same manner. The witness, however, swore that he was not a partner when the goods were supplied, and was then only 17 years of age, and that he had no share in the concern till 1814, when his father gave up the whole of the business in his favour.

It

1815.

GLOSSOP

v.

COLMAN
and Others.

It was objected by *Scarlett* for the defendant, that the father had precluded himself from suing alone by holding the son out to the world as his partner, and by signing such receipts.

Garrow A. G. contended, that this was only *primâ facie* evidence, and not conclusive, and that the son being an infant at the time, could not be looked upon as a partner.

Lord ELLENBOROUGH was of opinion, that the conduct of the father in giving receipts, &c. was competent evidence, but thought that it would be going too far to nonsuit the plaintiff upon it: He was willing to reserve the point. His Lordship also said, that though an infant was in general repelled from a contract of partnership, as being of too hazardous a nature for an infant to engage himself in, yet undoubtedly upon the most ancient authorities, he might make a contract for his own benefit.

Verdict for the plaintiff.

The Court of K. B. on motion made in the ensuing term, refused a rule *nisi* for a new trial on this ground, but granted it on another.

[Attornies, *Young* and *Sermon*.]

ROCHER v. BUSHER.

1815.

ASSUMPSIT for work and labour, and on the common counts.

The plaintiff was a merchant resident at *Oporto*, and claimed the amount of goods and monies supplied to the captain of the defendant's vessel at *Oporto*, for the use of the ship.

The owner of a vessel is liable for money supplied to the captain in a foreign port, provided the supply be absolutely necessary for the use of the vessel.

The *Attorney-General* for the defendant, disputed the items for money advanced to the captain of the vessel, contending, that in point of law, the owner was liable only for necessities supplied for the use of the ship, and not for monies supplied to the captain, to be subsequently appropriated by him; and he also contended, that in fact the monies had not been applied to the use of the ship. The captain (whom Lord ELLENBOROUGH held to be a competent witness) (a), proved generally, that certain sums advanced, had been so applied.

Lord ELLENBOROUGH C. J. In strictness, a claim of this kind is limited to articles supplied

(a) See *Evans v. Williams and Others*, sittings at *Guildhall* after *Trinity Term*, 28 G. 3. *coram* Lord *Kenyon*, who ruled, that the witness was competent, not on the ground of necessity, but on the ground that he stood indifferent between the parties, 7 T. R. 481. n.

1815.

ROCHER

v.

BUSHNER.

through necessity. But where the same necessity exists, money may be supplied as well as goods, and the amount recovered, this however must not be understood of an indefinite supply of cash, which the master may dissipate, but only such as is warranted by the exigency of the case, as for the payment of duties or other necessary purposes. I once held that proof of the strict application of the money to the purposes of the ship was necessary, and Mr. J. Heath sitting for the Chief Justice of the *Common Pleas*, did the same. We are in this case left much in the dark, and I cannot advise you to find more than you may deem to have been absolutely necessary for the use of the vessel.

Verdict for the plaintiff.

Park and for the plaintiff.

Garrow A. G. for the defendant.

[Attornies, Paterson and Blunt & Co.]

Monday,
May 22.

ROBERTS v. BRADSHAW.

A copy of a letter containing notice of the dishonour of a bill is admissible without notice to produce the original.

ACTION on a bill of exchange by the indorsee against the drawer. In order to prove notice of the dishonour, the *Attorney-General* for the plaintiff called a clerk of the plaintiff, who stated

Proof that duplicate notices of the dishonour of a bill were written, and that a letter was delivered to the defendant, upon the dishonour of a bill, together with proof of notice to produce the letter so delivered, as containing notice of dishonour is evidence (on default of production) that the defendant had notice.

that

that on the 2d of *February*, the day on which the bill had been dishonoured, his master gave him two papers to compare with each other, one of which the witness now produced, and purported to be a notice of the dishonour of the bill in question.

1815.
ROBERTS
v.
BRADSHAW.

Topping for the defendant objected, that this could not be read without proof of notice to produce that which had been so delivered ; but

Lord ELLENBOROUGH C. J. was of opinion, that a letter acquainting a party with the dishonour of a bill was in the nature of a notice, and that it was unnecessary to prove notice to produce such a letter.

Upon further examination the witness stated, that upon the day after he had compared the two papers, he carried a letter from the plaintiff to the defendant, but did not know the contents.

Lord ELLENBOROUGH was of opinion, that this was not sufficient evidence.

The plaintiff then proved the service of a notice on the defendant, calling upon him to produce a letter from the plaintiff, giving him notice of the dishonour of the bill mentioned in the declaration.

The *Attorney-General* contended, that this was sufficient evidence to go to a jury, that the original
had

1815.
ROBERTS
v.
BRADSHAW.

had been sent, and that it lay upon the defendant to shew by producing it, that the letter proved to have been delivered on the 3d of *February*, was nothing more than an invitation to dinner, or something else equally unconnected with the dishonour of the bill in question.

Topping. No answer has been given to the objection, a notice is of no avail to warrant the reading of a copy, unless the party be proved to have been in possession of the original, on the contrary the notice itself assumes the fact of possession.

LORD ELLENBOROUGH C. J. I think certainly that there is a looseness in this evidence, and you may afterwards move the Court upon it. Supposing, however, that the paper delivered had been a perfect blank, or contained matter wholly unconnected with the dishonour of the bill, you might have produced it and shewn the fact to be so, since it is evident what letter was the object of the plaintiff's notice. This is the first time the identity of such a letter has been so minutely scrutinized, and the proof might in many instances be attended with great difficulty, as where letters, after being written, are placed upon the table, it might afterwards be exceedingly difficult to identify them with those afterwards put into the post-office.

Verdict for the plaintiff.

The

The *Attorney-General* and *Walton* for the plaintiff.

1815.

Topping for the defendant.

ROBERTS

v.

BRADSHAW.

In the ensuing term the Court refused a rule *nisi* for a new trial.

UPON application made to appoint particular days for the trial of special jury causes, where there was no defence, Lord ELLENBOROUGH said, I wish this to be understood to be the rule in future.

Rule as to the appointment of particular days for special jury causes, not defended.

If the jury has been reduced and a case be made out shewing that there is no defence, I will appoint a particular day, that the plaintiff may have the benefit of the trial; but if the jury has not been reduced, the trial must come on as a common jury cause.

[Attornies, *Walton* and *Isaacson*.]

1815.

GILES and HEADINGS v. DYSON and GREENWELL,
Administrators of SEWARD.

As against an administrator, debts due to the intestate are not to be considered as assets till actually received, although not stated in the administrator's inventory to be desperate.

As against creditors an administrator cannot be allowed for disbursements, in the schooling, feeding, or cloathing of the intestate's children, subsequently to his decease.

Seemle, he is entitled for the reasonable charges of collecting the intestate's debts.

After putting in an inventory, it is for the administrator to discharge himself of the items which it contains.

ASSUMPSIT against the defendants as administrators for goods sold and delivered to the intestate. The defendants had severally pleaded the general issue and *plene administravit*. The plea of *plene administravit* was admitted as to *Greenwell*, but denied as to *Dyson*.

The defendant *Dyson* had, in the year 1811, exhibited an inventory in the ecclesiastical court, and the question was, whether the several items of disbursement which it contained were allowable.

Richardson for the plaintiff in the first place contended, that certain debts which the defendant in his inventory allowed to be due to the estate, and which he did not represent to be desperate, were to be considered as actual assets in the defendants' hands, and he cited the case of *Smith v. Davis, Selw. N. P. 712.*, where the rule is so laid down, but he admitted that it was competent to the defendant to shew that these debts had not been paid.

LORD ELLENBOROUGH. — You must prove, presumptively at least, that these debts have been paid; that presumption may depend on the time and a

number

number of other circumstances, but upon the plea of *plene administravit* it is necessary to prove that effects came into the hands of the defendant; this is the universal practice.

1815.
GILES
and Another
v.
DYSON
and Another.

One item of expenditure contained in the inventory, was for cloaths and other necessities provided, and schooling paid for the use of the intestate's children since his death.

Lord ELLENBOROUGH was of opinion, that such expences were inadmissible, as against creditors.

Another item consisted of charges at the rate of 5*l.* *per cent.* for collecting the debts of the intestate; and upon this and some other items,

Lord ELLENBOROUGH held, that it was necessary for the defendant to prove that the charge was reasonable, it might under particular circumstances be an inadequate remuneration, under other circumstances it might be a most exorbitant charge, and that after the putting in of the inventory, it was for the defendant to discharge himself of the items.

Verdict for the plaintiffs.

The amount of the damages referred.

Richardson and Gifford for the plaintiffs.

Park and Moore for the defendants.

[Attornies, *Robinson & Co.* and *Surman.*]

1815.

WILSON v. SWABEY.

Notice to the drawer of a bill of exchange of its dishonour by *any party* to the bill, enures to the benefit of all.

ASSUMPSIT by the indorsee against the drawer of a bill of exchange.

The bill became due on *Thursday* the 2d of *March*; notice of the dishonour was communicated to *Lewis* an indorser on the *Friday*, and by him to the defendant on the *Saturday*.

Reader for the defendant objected, that the notice had not been given by the party who sued upon the bill. But,

Lord ELLENBOROUGH was of opinion, that notice from any person who was a party to the bill was sufficient.

Verdict for the plaintiff.

Reader for the defendant.

[Attornies, Lane and Coates.]

CRISP v. ANDERSON.

1815.

ASSUMPSIT, for work and labour and materials found.

Against a party who refuses (after notice) to produce an agreement, it is to be presumed that it is stamped. But the party refusing is at liberty to prove the contrary.

The plaintiff proved work done by him to the amount of near 48*l.*, on board the ship *Brunswick*, for the defendant; and he also proved that a sky-light had been delivered to the defendant by the plaintiff, which the defendant had sent back, alleging (which was not the fact), that it was made of improper materials.

The defence was, that by a written agreement between the parties the price of the work, exclusive of the sky-light, was to be 47*l.* and a fraction, one half of which was to be paid when the work was done, and the other at a period which had not then expired, and that as the defendant had paid more than one half, *i. e.* the sum of 24*l.* into court, and as the plaintiff had not proved any order for the sky-light, the plaintiff ought to be nonsuited.

This agreement having been proved, the *Attorney-General* for the plaintiff proposed to give in evidence, a copy of an agreement relating to the sky-light, the original having been shewn to be in the hands of the defendant.

1815.

CRISP

v.

ANDERSON.

Campbell objected, that before an unstamped copy could be read, it was necessary to prove that the original agreement was stamped.

LORD ELLENBOROUGH. — Am I to presume that this agreement is unstamped in favour of a defendant who refuses to produce it; I ought rather to presume *omnia rite acta* particularly after notice. I shall assume it to have been stamped until the contrary appear.

The witness then stated, that the original was not stamped, and the evidence was rejected.

The Court intimating an opinion, that as the defendant had returned the sky-light, not on the ground that he had not ordered it, but on the ground that it was made of improper materials, he had thereby admitted the order.

Campbell objected, that the oral evidence on this head was inadmissible, since it appeared that a written agreement existed concerning the subject matter.

LORD ELLENBOROUGH. — I do not know that the agreement regulates the price, and I cannot presume any thing upon the subject.

The plaintiff had a verdict for the value of the sky-light.

The

AFTER EASTER TERM, 55 GEORGE III.

37

The *Attorney-General* and *Lawes* for the plaintiff.

1815.

Campbell for the defendant.

CRISP

v.

ANDERSON.

[*Attornies, West and Hutchinson.*]

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GUILDHALL.

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Coram LE BLANC.

COTTLE v. ELIZABETH ALDRICH, Executrix of Wednesday,
CHARLES ALDRICH. May 24.

ASSUMPSIT against the defendant as executrix
of *Charles Aldrich*. Plea, the general issue;
and *ne unques* executrix.

A. who inter-
meddles with
the affairs of
B., under the
direction of C.
(one of the ex-
ecutors of B.
but who has
declined to
prove the will,
is chargeable
as executor de
son ter

The plaintiff proved that the defendant had in-
termeddled with the goods of *Charles Aldrich*.

Upon the part of the defendant it appeared, that
Charles Aldrich had appointed three executors,
namely, his brother *John Aldrich*, *John Denton*,
and *John Taylor*. Probate was granted to *John*
Aldrich, the usual rights being reserved to the two
other executors when they should come in. —
Neither *Denton* nor *Taylor* proved the will.

John Aldrich, residing in *Ireland*, authorized
Denton and the defendant *Elizabeth Aldrich*, to
manage

1815.

COTTLE

v.

ALDRICH.

manage the affairs of *Charles Aldrich* for him, which they accordingly did. *John Aldrich* by his will appointed *Elizabeth Aldrich* the defendant, along with *William Aldrich* and *William Weever* his executors; *Elizabeth Aldrich* alone proved the will of *John Aldrich*, and after his death managed the estate of *C. A.* under the direction of *Denton*.

Park for the defendant contended, that since there were two surviving executors of *Charles Aldrich*, the defendant could not be charged as executrix *de son tort*, and that in this case she acted as the agent of *Denton*, one of the legal executors.

The *Attorney-General* for the plaintiff contended, that although *Denton* might be liable, having acted as executor, he could not constitute the defendant a legal agent without having proved the will.

LE BLANC J.—It comes to the question whether *Denton* can be considered as an executor, not having clothed himself with that character by administering to the effects. I should be glad to know by what authority this is to be supported.—The defendant not producing any authority to that effect.

The plaintiff had a verdict.

Garrow A. G. for the plaintiff.

Park and *Minchin* for the defendants.

In the ensuing term, the Court refused a rule nisi for a new trial.

[*Attornies, Sweet & Co. and Briggs.*]

COLTON v. LINGHAM.

1815.

THE defendant had demised to the plaintiff a public house for the term of 14 years, upon an agreement that the plaintiff should be at liberty to quit the premises on the 25th of *March* 1814, in which event the defendant undertook to take the furniture at a valuation, or to permit the plaintiff to let the house to a respectable tenant. In *August* 1813 the plaintiff let the premises to Messrs. *Calvert and Co.*, who were to continue in possession till the 25th of *March* 1814; previous to the 25th of *March* 1814 the plaintiff had the furniture valued according to the terms of the agreement, and gave notice to the defendant that he intended to give up the premises to him on the 25th; the defendant however, had refused to take the furniture, &c., and upon this breach of his undertaking the present action was brought.

An agreement between landlord and tenant that the latter shall be at liberty to quit at Lady-day 1814, in which event the former undertakes to take the fixtures at a valuation, or to permit the tenant to let the house to a respectable tenant, creates an option to be exercised by the tenant, in case he gives up the premises.

A letting by the tenant to an undertenant till Lady-day 1814, is not an exercise of his right of option.

Park for the defendant contended, that the plaintiff ought to be nonsuited, for 1st, the proposition on the part of the defendant was in the alternative, either in case the plaintiff, on the 25th of *March* 1814, chose to relinquish the premises, to take back the fixtures at an appraisement, or to permit the plaintiff to let them to a respectable tenant; this was an option to be exercised on the part of the defendant, and therefore he was not bound to take the fixtures at a valuation.

D 4

2dly, By

1815.
COLTON
v.
LINGHAM.

2dly, By putting *Calvert and Co.* into possession of the premises as tenants to the plaintiff, he virtually exercised his option upon the alternative, and elected to put in a tenant.

LE BLANC J. was of opinion on the first point, that the option was given to the plaintiff, and upon the second, that since *Calvert and Co.* by the terms of agreement were to continue in possession till *Lady-day* only, up to which time the plaintiff was bound to remain tenant to the defendant, he had not exercised his option.

Verdict for the plaintiff.

Garrow A. G. for the plaintiff.

Park for the defendant.

[Attornies, *Lewis and Reardon & Davis.*]

SITTINGS AT GUILDHALL.

Thursday,
May 25.

LOYD and Others Assignees of PALMER a Bankrupt v. STRETTON.

A petitioning creditor is a competent witness to defeat the commission, and even to cut down the petitioning creditor's debt.

TROVER to recover the value of four bills of exchange.

The

The plaintiffs having made out a *primâ facie* case,

1815.

LORD
and Others

v.
STRETTON.

Park for the defendant proposed, on the authority of *Green* and *Jones* (a), to call *Wilkinson*, the petitioning creditor, as a witness to defeat the commission.

The *Attorney-General* contended, that he was incompetent.

LORD ELLENBOROUGH. — Upon principle, I think he may be called to defeat the commission, though he cannot be called on to support it. The ground on which this point seems to be most disputable, is, whether a petitioning creditor, after the representation which he has made to the Great Seal, can be permitted in a court of law to overturn that which may involve the interests of so many creditors.

The petitioning creditor was then called and questioned, for the purpose of shewing that the act of bankruptcy had been concerted between himself and the bankrupt. Upon being afterwards examined as to the debt on which the commission was founded,

The *Attorney-General* objected, that at all events he was incompetent to cut down his own debt.

1815.

Lord ELLENBOROUGH.—I think he is competent.

LLOYD
and Others
v.
STRETTON.

The plaintiff eventually chose to be nonsuited.

The *Attorney-General* and *F. Pollock* for the
plaintiff.

Park and *Abbott* for the defendant.

[*Attornies, Knight & Freeman and Hackett.*]

CASES

ARGUED AND DECIDED

AT

NISI PRIUS

IN K. B.

At the Sittings in Trinity Term.

55 GEORGE III.

FIRST SITTING IN TRINITY TERM.

BARNARD and Another v. LEIGH and Another.

1815.

ACTION on the case against the defendants as sheriff of *Middlesex* for a false return to a writ of *fi. fa.*

A sheriff having seized goods under a *fi. fa.* which he retains in his hands, conceiving that the sale made by his broker is fraudulent, is not justified in returning that the goods remain in his hands for

The defendants' officer had taken a lease and some fixtures in execution under the writ of *fi. fa.*, the former was proved to be worth 800 or 1000*l.* This was put up to sale by an auctioneer employed by the defendants, but some suspicion having been thrown upon the title, no one offered more than want of purchasers. — He ought in such case to apply to the court for further time, on the ground of the special circumstances.

But (*semble*) in an action for a false return under these circumstances, the inadequate price offered is the proper measure of damages.

5*l.* till

1815. } 5*l.* till the partner of the auctioneer bade 180*l.*,
 BARNARD and Another } and the lease was knocked down to him at that
 sum.

v.
 LEIGH
 and Another.

The defendants afterwards refused to assign the lease to the purchaser, conceiving the sum to be inadequate, and the sale to the auctioneer illegal, and they afterwards returned that they had caused this property to be seized, the value of which was unknown, and that it remained in their hands for want of buyers.

Gurney for the defendants contended, that the sheriff was justified in making such a return, and cited *Keightly v. Birch* (a), and *Cameron v. Reynolds* (b), that it was the duty of the sheriffs not to permit a sale at so inadequate a price, and that they were justified in refusing to assign the lease to an improper purchaser. That as to the fixtures, it was the duty of the sheriff to sell them with the lease, for otherwise they could not be sold to so great advantage.

The *Attorney-General* for the plaintiff contended, that with respect to the fixtures, the plaintiff was at all events entitled to recover. The defendants were bound to sell them, and might have taken them to a broker's shop for the purpose. It was at all events the duty of the defendants to have proceeded to a second sale within a

(a) 3 Camp. 521.

(b) Cowp. 403.

convenient time, and to have taken due means to procure a sale.

1815.

BARNARD
and Another
v.
LEIGH
and Another.

LORD ELLENBOROUGH. — It appears to me that the plaintiffs are entitled to recover; I do not however see any thing reprehensible in the conduct of the defendants, except that they have employed persons who are not trust-worthy. — The plaintiffs are I think at all events entitled to recover the value of the fixtures; as to the lease a question of law arises. The sheriff might have applied to the Court for time to make his return, on account of the special and unforeseen circumstances of the case, and the Court would probably under such circumstances have enlarged the time; but here he has returned what is not true, that the goods remained in his hands for want of buyers. The sum offered indeed was not adequate to their value, but they remained unsold, not for want of buyers, but because they had been put into the hands of roguish brokers. The difficulty is as to the amount of the damages. My present inclination is to advise the jury to find the 180*l.* which was the sum offered for the lease, and the value of the fixtures.

His Lordship advised the jury, and they found accordingly.

The Attorney-General and Bailey for the plaintiffs.

Gurney and Holt for the defendants.

[*Attornies, Frowd and Smith.*]

 FIRST DAY AFTER TERM IN LONDON.

1815.

FORMAN v. JACOB.

Where a bill of exchange is payable a specified number of days after sight, the real day of presentment for acceptance need not be alleged, a presentment on a day subsequent to that alleged may be proved.

And in such case a subsequent allegation of presentment for payment, when the bill became due and payable is supported by proof of a presentment on the day when the bill in fact became due, according to the previous presentment.

ASSUMPSIT by the plaintiff as the indorsee, against the defendant as the acceptor of a bill of exchange, dated *Constantinople August 11, 1814*, directed to the defendant in *London*, payable 50 days after sight, to *Phillip Phillip*, and by him indorsed to the plaintiff. The declaration alleged a presentment, &c. and acceptance on the day the bill bore date, and a presentment for payment accordingly.

It appeared that the bill had in fact been presented for acceptance, and accepted on the 19th of *September*, and had been presented for payment on the 11th of *November*.

Lawes, for the defendant, objected a double variance; 1st, on the ground that the presentment for acceptance where the bill is payable after sight is material, and that therefore the true day ought to have been inserted, and 2dly that the presentment for payment on the 11th of *November*, was not a presentment *when the bill became due and payable*, as alleged in the declaration.

Lord

LORD ELLENBOROUGH was of opinion, that “*when the bill became due and payable,*” was with respect to the acceptor, the same as *after the bill became due and payable*, and that it was sufficient if it appeared in evidence that the bill had been presented for payment after the time when it became due, according to the terms of the bill and the date of presentment for acceptance.

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FORMAN
v.
JACOB.

It afterwards appeared, that the name of the indorser was *Phillip Phillips*, and it was objected, that this varied from the allegation of an indorsement by *Phillip Phillip*, the person being different. The bill itself was payable to *Phillip Phillips*, and the name was so indorsed on the bill.

A variance between the real name of an indorser, and that which is alleged in the declaration, and appears on the bill is immaterial.

LORD ELLENBOROUGH. — Whether the name on the bill be the party's false or true name is immaterial, if it be his name of trade; the only question is, as to the identity of the person.

Verdict for the plaintiff.

Park for the plaintiff.

Garrow A. G. and *Lawes* for the defendant.

[Attornies *Kaye & Co.* and *Collins.*]

IN THE KING'S BENCH.

SITTINGS AT WESTMINSTER:

After Trinity Term,

55 GEORGE III.

1815.

Same day.

BRISTOW v. HEYWOOD.

Averment in an action for a malicious arrest, that the defendant detained the plaintiff *until he found bail*. If some detention be proved, it is sufficient to support the action, although no bail was put in.

An averment that the suit is wholly ended and determined, is evidenced by proof of the rule to discontinue upon payment of costs, and that the costs were taxed and paid.

CASE for maliciously holding the plaintiff to bail for the sum of 40*l.*, although no sum whatever was due.

The declaration alleged, that the defendant arrested the plaintiff, and detained him *until he found bail*.

It appeared in evidence, that upon the arrest, the plaintiff had not given bail, but according to the provisions of the statute, had deposited 30*l.* in the hands of the officer, 20*l.* on account of the debt, and 10*l.* for the costs.

Lawes, for the defendant, objected, that this was a variance, since the inconvenience proved to have

A. having by his laches lost all right of action on a note indorsed by B., arrests B., and afterwards discontinues the action, these circumstances do not of themselves so exclude all probable cause as to afford a presumption of malice.

been

been suffered, was of a different nature from that specified; but

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HEYWOOD.

LORD ELLENBOROUGH was of opinion, that since it was true that he had detained the plaintiff, although not until he found bail, the action was maintainable.

The plaintiff, in order to prove the allegation in the declaration that the suit was wholly ended and determined, gave in evidence the rule to discontinue upon payment of costs, and prove also, that the costs had been taxed and paid.

Park for the defendant, objected, that some further document ought to be produced, in order to shew that the cause was ended, and that the roll should be produced with the judgment of discontinuance entered upon it.

The *Attorney-General* for the plaintiff, answered, that there was no such document, there was nothing more than the affidavit, the writ and the rule to discontinue.

For the defendant, it was replied, that a roll would have been ordered upon an application to a judge at chambers, and that the rule to discontinue was merely optional, and that in *Kirk v. French* (a) it was holden to be insufficient to produce a judge's order to stay proceedings.

LORD ELLENBOROUGH, after inquiring whether there was any instance of such an application ever

(a) 1 Esp. 80.

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BRISTOW

v.

HEYWOOD.

having been made, observed that the option in this case had been exercised by the defendant, since the costs had been taxed and paid. — The case cited, (he observed) was of an application to a judge to stay proceedings, and was a judge's order, and not a rule of Court to discontinue.

It afterwards appeared, that the plaintiff and defendant had dealt together in the course of trade, and that the plaintiff, in payment for some goods, had indorsed to the defendant a promissory note made by a person of the name of *Chapman*, for the sum of 15*l.* 7*s.*, this bill had been dishonoured when it became due, and the defendant having neglected to give due notice of the dishonour, had by his *laches* made the bill his own, and lost all claim against the plaintiff as the indorser. It also was stated, that the defendant had signified to the plaintiff his intention to apply to *Chapman* for payment, and that he had borrowed 7*l.* from the plaintiff after the dishonour of the bill, and before the arrest.

LORD ELLENBOROUGH was of opinion, that the discontinuance of the action did not exclude the existence of a probable cause, and that under the circumstances of the case, there was no evidence of malice, for though the defendant ought to have given notice of the dishonour of the note, still the note itself existed, upon which the plaintiff's name appeared as an indorser.

Plaintiff nonsuited.

Garrow

AFTER TRINITY TERM, 55 GEORGE III.

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Garrow A. G., and Comyns for the plaintiff.

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Park and Lawes for the defendant.

BRISTOW
v.
HEYWOOD.

[Attornies, *Maybew* and *Collins*.]

SOLOMON v. TURNER, Bart.

Monday,
June 19.

ASSUMPSIT on a promissory note made by the defendant payable to the plaintiff.

A defendant who has given his promissory note, as the stipulated price of a picture, cannot give the inadequacy of the consideration in evidence, with a view to diminish the damages, but he may give it in evidence as a circumstance indicative of fraud, in order to defeat the contract altogether.

The defendant's signature to the note having been proved, the *Attorney-General* for the defendant proposed to prove that certain pictures had been sold by the plaintiff who was a dealer, to the defendant, at prices infinitely exceeding their real value, and that the note in question had been given as a security for the price of one of these.

Park for the plaintiff, objected that it was not competent to the defendant to give in evidence the inadequacy of the consideration for which the note was given, and cited *Morgan v. Richardson* (a), and *Tye v. Gwynne* (b), and insisted upon the distinction between want of consideration, and a partial failure of consideration.

(a) Cited 7 East, 483. 1 Campb. 40. n.

(b) 2 Campb. 346.

1815.

SOLOMON
v.
TURNER.

The *Attorney-General* for the defendant, offered to prove that two notes had been given, one of which for the sum of 200*l.* had been paid, and that that sum was more than adequate to the value of the pictures. In the cases cited, the articles were of a perishable nature, but in this case the plaintiff knew that the pictures were of little value, and therefore he, the defendant, was at liberty to resist the claim, on the ground of fraud and deceit; and he cited the case of *Fleming v. Simpson* (a).

LORD ELLENBOROUGH. I will not admit the evidence for the purpose of reducing the damages by shewing that the pictures were of an inferior value, but if you can, by the inadequacy of the value and other circumstances, prove fraud on the part of the plaintiff, so as to shew that there was no contract at all, the evidence will be admissible; if it fall short of that, it will be unavailable.

The defendant failing to give such proof, the plaintiff had a verdict.

Park for the plaintiff.

The *Attorney-General* and *Adam* for the defendant.

[Attornies, *Jones* and *Watkins*.]

(a) 1 Campb. 40. *n.* See *Lewis v. Cosgrave*, 2 Taunt. 2.

1815.

STONE v. METCALF.

ASSUMPSIT by the plaintiff as the payee against the defendant as the maker of a promissory note for 1000*l*.

The witness who proved the defendant's signature was asked upon cross-examination by *Topping* for the defendant, who wrote an indorsement on the back of the bill.

The *Attorney-General* for the plaintiff objected to this, since it appeared that the indorsement had been attested by a witness who had subscribed his signature as an attesting witness.

When the bill was read, *Topping* contended that he was entitled to have the indorsement read as well as the body of the note.

LORD ELLENBOROUGH. — The plaintiff is entitled to have the note read, having proved the defend-

plaintiff, the payee, undertakes to enlarge the time for payment specified in the body of the note, cannot be considered as incorporated with the note so as to render an agreement stamp necessary.

The payee of a note indorses upon it, my will and desire is, that the money shall not be called in for two years, &c. and that if the said C. S. shall wish for further time, he shall have it without suit at law until three years next after my decease; *semble*, these are words of mere indulgence and favour and do not operate as a defeasance.

Qu. What their effect would be as between the maker of the note and the *executors* of the payee?

An indorsement upon a promissory note, purports to have been attested by a subscribing witness, the witness must be called to prove such indorsement.

The maker of a promissory note, whose signature has been proved in an action by the payee, cannot insist upon indorsements being read, which are not a part of the note.

An agreement indorsed on a note, by which the

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STONE

v.

METCALF.

ant's signature, but that which is indorsed upon the note may be a different instrument wholly unconnected with the note.

The defendant having proved the indorsement by the subscribing witness, the indorsement was read in these terms, "Although the within promissory note is payable by *Charles Metcalf* in ——— months, my will and desire is, that the money shall not be called in for two years, and that if the said *Charles Metcalf* shall wish for further time he shall have the same without suit at law, until three years next after my decease.

(Signed)

——— *Stone.*"

Topping contended on the authority of *Leeds v. Lancashire* (a), that the indorsement was part of the note, and therefore that as this was an agreement between the parties, it should have been stamped as an agreement, and declared upon as such.

LORD ELLENBOROUGH. — I have on one side of the paper a perfect note in point of law, and on the other, that which, if it had been stamped, might have operated as a defeasance, but without a stamp I cannot look at it. Supposing however these words to be incorporated, they are words of mere indulgence and favour; he says my will and desire is, &c. as to the executors, the case might be different.

Verdict for the plaintiff.

(a) 2 Campb. 205.

The *Attorney-General* for the plaintiff.

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Topping for the defendant.

STONE
v.
METCALF.

[Attornies, *Worham* and *Baxter*.]

GOSSON v. GRAHAM.

Same-day.

TRESPASS; 1st. count, for breaking and entering an apartment of the plaintiff, and seizing and throwing out of the window a number of jars and a quantity of paint and varnish. Another count for taking and carrying away and converting to the defendant's use a number of jars and quantity of varnish.

Trespass, the breaking of a jar is sufficient to entitle the plaintiff to full costs under a count, alleging an *asportation* and *conversion*.

A trespass was proved, by breaking into the apartment, and it was also proved that the defendant threw down and broke a jar belonging to the plaintiff.

Verdict for the plaintiff, damages 1s.

Comyn for the defendant, suggested that the plaintiff was not entitled to more costs than damages, since the breaking of the jar was not a taking and carrying away and converting under the latter count.

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GOSSON

v.

GRAHAM.

But Lord ELLENBOROUGH was of opinion that the plaintiff under the circumstances was entitled to full costs, and as it appeared that the parties had reciprocally been guilty of vexatious acts, he refused to certify under the stat. of *Eliz.* for the purpose of depriving the plaintiff of costs, although the trespass appeared to be of a very trivial nature.

Gurney and Starkie for the plaintiff.

Comyn for the defendant.

[Attornies, *Hughes* and *Beckett*.]

Tuesday,
June 20.

PICKERING v. RUDD.

Trespass for cutting down a Virginian creeper; plea, removal, because it was doing damage to the defendant's premises. Replication, that the defendant used greater force

and violence, and did greater damage than was necessary. On issue joined upon this replication, the plaintiff cannot go into evidence to shew the quantum and nature of the damage done to the premises.

A. erects a board which projects over B.'s land, at a considerable distance from the surface, and occasions inconvenience to B. *Qu.* whether B.'s remedy is by action of trespass q. c. f. or an action on the case.

DECLARATION for breaking and entering the plaintiff's close; for setting up, putting up, hanging, and placing a certain shew-board in and upon and over the land of the plaintiff, and for breaking, lopping, and damaging a tree there growing. Plea, the General Issue, and as to the tree, the defendant pleaded that it was unlawfully spreading over a certain messuage of the defend-

ant's

ant's adjoining to the *locus in quo*, and that because it was an incumbrance to his premises, therefore, &c. doing no unnecessary damage.—Replication that the defendant of his own wrong, &c., and with greater force and violence than was necessary, and with greater damage to the said tree than was necessary, &c., on which issue was joined.

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PICKERING
v.
RUDD
and Another.

It appeared, that the house of the defendant adjoined to the garden of the plaintiff, which was behind his house in *Bernard Street*, and that a *Virginian* creeper which grew in the plaintiff's garden, spread itself over the side of the defendant's house, and was very ornamental to the prospect from the plaintiff's house. The defendant, a hair cutter, wishing to hang up a shew-board on that side of his house, which was overspread by the *Virginian* creeper, managed by means of ropes and a scaffolding suspended over the garden, without touching the surface of the plaintiff's premises, to cut away such a portion of the creeper as was sufficient to admit the shew-board, and affixed the board to his own house, projecting from three to four inches from the surface of the wall.

The *Attorney-General* and *Richardson* for the plaintiff, were going into evidence to shew that the tree had not produced dampness or other inconvenience to the premises of *Mr. Rudd*.

Jervis,

1815.
PICKERING
v.
RUDD
and Another.

Jervis, for the defendant, objected to such evidence, contending that such a damage as gave a right to remove was admitted by the pleadings, and there was no new assignment.

LORD ELLENBOROUGH. — The defendant justifies the removal of the tree as being noxious to his premises; the plaintiff, by his replication, admits it to have been mischievous to some extent, and the issue is, whether the defendants used more force and violence, and did more damage to the tree than was necessary. The plaintiff admits a breaking to be necessary, and therefore it cannot now be drawn into question, whether a breaking was necessary or not.

It was then contended for the plaintiff, that the putting up of the board, which projected three or four inches from the defendants' wall, over the garden of the plaintiff was of itself a trespass, and this had not been justified.

LORD ELLENBOROUGH. — You must prove that the projection is a trespass; it may be a very nice question. — I recollect a case, where I held that firing a gun loaded with shot into a field was a breaking of the close. The learned judge on the circuit with me, doubted upon the point, but many with whom I afterwards conversed on the subject, thought I was right; and the judge himself, who at first differed from me, was afterwards of the same opinion; but I never yet heard, that firing *in vacuo* could

could be considered as a trespass. No doubt, if you could prove any inconvenience to have been sustained, an action might be maintained : but it may be questionable, whether an action on the case would not be the proper form. Would trespass lie for passing through the air in a balloon over the land of another ?

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PICKERING
v.
RUDD
and Another.

The *Attorney-General* and *Richardson* contended that the dropping of rain from the projecting board upon the garden of the plaintiff was an inconvenience which entitled him to an action ; and that if the projection was not a trespass, it would be no trespass to cover the whole extent of the garden.

LORD ELLENBOROUGH. — Undoubtedly an action would be maintainable in that case for obstructing the light, but it is another question whether an action of trespass lies for interfering with the column of air incumbent on the land.

It afterwards turned out that the board did not extend beyond the foundation wall of the defendant's house, which put an end to all question upon that point.

LORD ELLENBOROUGH in summing up to the jury, told them that it was admitted upon the record that some damage had been done by the continuance of the tree, and that the question was, whether in removing the mischief the defendants had

1815. had done any damage to the tree which might
 PICKERING have been avoided.

v.
 RUDD
 and Another.

Verdict for the defendants.

The *Attorney-General* and *Richardson* for the
 plaintiff.

Jervis and *Abbott* for the defendants.

In the ensuing term the court of *King's Bench*
 refused a rule *nisi* for a new trial.

[*Attornies, Caley and Presland.*]

Same day.

DEADY and Another Assignees of GANSON v.
 HARRISON.

A. takes B.'s
 goods in exe-
 cution after an
 act of bank-
 ruptcy com-
 mitted by B.,
 and assigns
 them to C.

A.'s examina-
 tion taken un-
 der the com-

mission subsequently to the assignment, cannot be read in an action by the assignees
 against C. in order to shew A.'s knowledge of B.'s insolvency at the time of the execution.

But (*Semble*) an examination taken previously to the assignment, would have been
 admissible.

In such a case the question is not whether C. knew, but whether A. knew that B.
 was insolvent.

TROVER by the plaintiffs as the assignees of
Ganson a bankrupt, against the defendant,
 who claimed under an execution at the suit of
Loyd.

It appeared that the bankrupt had committed an
 act of bankruptcy on *December* 9th, 1813, the

goods

goods were taken in execution at the suit of *Loyd* on the 29th of *December* 1813, and in pursuance of an agreement, dated *February* 7, 1814, between *Loyd* and *Harrison* (who was the landlord of the premises on which the execution was levied), the goods were assigned by the sheriff to *Harrison* as the purchaser. The principal question was, whether *Harrison* was protected by the stat. 49 G. 3. c.121. the commission not having been taken out till after the expiration of two months after the execution.

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DEADY
and Another
v.
HARRISON.

Gaselee for the plaintiffs proposed to give in evidence the examination of *Loyd* under the commission, dated 3d *June* 1814, to shew his knowledge at the time of the execution, of *Ganson's* insolvency, stating, however, his own difficulty on the point, which arose from the date of the examination; had it been previous to the assignment there could have been no doubt; but the question was, whether it was competent to him to defeat his own assignment.

Lord ELLENBOROUGH was of opinion, that upon this ground his evidence was inadmissible, and that the question was not whether *Harrison* knew of the insolvency at the time of the execution, but whether *Loyd* knew it.

Other evidence was given to shew *Loyd's* knowledge.

Verdict for the plaintiff.

Gaselee

1815.

DEADY
and Another
v.
HARRISON.

Gaselee and Tyndal for the plaintiffs.

Park and Comyns for the defendant.

[Attornies, *Aldridge and Howell.*]

Same day.

FITCH v. TOULMIN.

A plea *puis darrein continuance*, will be received when tendered at *Nisi Prius*, if it bear the form and semblance of a plea; but in order to prevent vexatious delay, the Court will order a demurrer to such a *plea*, to stand for the first paper day in term.

ACTION against the defendant as an administrator. When the cause was called, *Peake* for the defendant, tendered a plea *puis darrein continuance* of judgment recovered by a creditor.

Marryatt for the plaintiff, contended, that under the circumstances which he was about to enter into, such a plea was a mere nullity.

LORD ELLENBOROUGH. — If it has the form and semblance of a plea, I shall receive it, it may probably be a bad plea, but that cannot be considered here.

The plea was put in and tacked to the record.

LORD ELLENBOROUGH afterwards said, In order to prevent practices of this kind from being resorted to for the purpose of delay, let it be understood, that the plaintiff if he succeed on demurrer,

shall be as forward as to judgment as if he had obtained a verdict to-day. It shall stand for the first paper day in term.

1815.
FITCH
v.
TOULMIN.

Marryatt for the plaintiff.

Peake for the defendant.

[Attornies, *Rice and Bleasdale & Co.*]

REX v. HOULDITCH and Another.

Same day.

TWO cases stood in the cause list in this order, *Rex v. Houlditch, Rex v. Houlditch and Another*, in both of which special juries had been struck by the prosecutor; the causes had also been entered by the defendants as common jury causes in the same order.

One indictment against A. and another against A. and B., are entered for trial in the above orders, special juries having been struck in both, and both having been entered as common jury causes, the prosecutor cannot, by withdrawing the first record, reverse the order of trial.

Park, for the prosecution, insisted, that as the special juries had been struck by the prosecutor, he had a right to have the latter cause tried the first.

• **LORD ELLENBOROUGH.**—If one had been a special jury and the other a common jury cause, the former would have had precedence. As they are both special juries they must be taken in the order in which they are entered.

Park.

1815.

REX

v.

HOULDITCH
and Another.

Park.—Then I will withdraw the record in *Rex*
v. *Houlditch*.

LORD ELLENBOROUGH.—I think you have not the same dominion over the record in a criminal as in a civil cause, and that the prosecutor cannot by withdrawing the record prevent the defendant's acquittal; but at all events, he cannot, where there is a common jury pannel also, the cause having been entered by the defendant.

His lordship afterwards said, If you do withdraw the record, I shall direct the common jury cause to be called.

Both were tried at the same time by consent.

Park for the prosecution.

[Attornies, *Harmer* and *Christie*.]

Same day.

JAGGERS v. BINNINGS, and Another.

A. and B. are partners, and part-owners of a vessel, an admission by A. as to a subject of copart-ownership, but not of co-partnership is not binding on B.

ACTION against the defendants as part-owners for seamen's wages.

The question arose, whether *A.* and *B.* being partners, and also part-owners of a vessel, the admission of *A.* as to a subject of copart-ownership, but not of copartnership was binding upon *B.*

Lord ELLENBOROUGH ruled that it was not:

Gurney and Tindal for the plaintiff.

J. Parke for the defendants.

[Attornies, *Ashfield* and *Rasser*.]

1815.

JAGGERS

v.

BINNINGS
and Another.

CANE v. BALDWIN and Others, Executors of
BALDWIN. Saturday,
June 24.

ACTION to recover 3*l.* paid to the defendants as a deposit on the purchase of a lot of land upon *Hamwell Moor*, which had been inclosed under an act of parliament. This act directed that the commissioners might, before the execution of their award, by public notice direct that all rights of common should be extinguished, such notice had been given, but the commissioners had made no assignment of the lands according to their apportionment. By the terms of the sale, the copyhold land was to be surrendered, and the freehold conveyed at the expence of the purchaser.

The vendor of newly inclosed lands undertakes to convey them to the vendee, this is an undertaking to convey the legal estate; and the vendor having only an equitable interest previous to the assignment by the commissioners the vendee is entitled to recover his deposit.

Garrow A. G. for the defendants, contended, that by the agreement on the part of the defendants, it was to be understood that the purchaser's name was to be substituted for that of the

1815.

CANE

v.

BALDWIN
and Others.

vendor's, and that they would assign such interest as they had in the premises. But

Lord ELLENBOROUGH was of opinion, that the defendants had undertaken for the conveyance of a legal estate, and that as it appeared they had no more than an equitable one, the plaintiff was entitled to recover.

It appeared that 29*l.* had been paid by way of deposit, and 2*l.* as auction duty to the auctioneer.

The *Attorney-General* contended, that the duty which had been paid over by the auctioneer to the Crown was not recoverable.

Lord ELLENBOROUGH. — If a person will sell that to which he has no title, he must return the money *in solido*.

Verdict for the plaintiff.

Topping and *Marryatt* for the plaintiff.

Garrow A. G. for the defendant.

[*Attornies, Lockett and Cookney.*]

TEMPEST v. CHAMBERS.

1815.

CASE for maliciously and without probable cause procuring the plaintiff to be arrested on a charge of felony, and for words imputing felony.

Averment that A. before a magistrate maliciously charged B. with felony; the information contains a mere charge of tortious conversion upon which a warrant for felony was improperly founded; the variance is fatal.

The 1st and 2d counts of the declaration alleged that the defendant appeared before a magistrate, and charged the plaintiff with having *feloniously* taken away a pair of shutters belonging to the defendant.

Words imputing felony, but spoken with reference to such warrant, and not intended to convey a substantive charge, are not actionable.

Upon the information being produced, it appeared on the face of the information, that the defendant had charged the plaintiff with having unlawfully taken away a pair of shutters belonging to the plaintiff, and having converted the same to his own use, against the form of the statute, &c. the language of the warrant was similar.

Lord ELLENBOROUGH was of opinion that the variance was fatal, since it appeared that the defendant had not charged the plaintiff with felony, but with a bare trespass, in taking away the shutters, for which no warrant ought to have issued.

The defendant having obtained the warrant, on meeting with *Sakmon*, an agent of the plaintiff's, said, " I have got a warrant for *Tempest*, I will

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TEMPEST

v.

CHAMBERS.

“advertise a reward of 20 guineas to apprehend
“him. I shall transport him for felony.”

LORD ELLENBOROUGH. — The case is reduced to the speaking of the words. The defendant probably thought that as he had obtained a warrant, the plaintiff had been guilty of felony. The warrant was improperly granted, and if proper attention had been paid to the circumstances, it would not have issued.—This is different from the case of words spoken without explanation to a stranger, since they were spoken to one who had been employed as the plaintiff's agent, and arose out of the situation of the parties. He put his own sense upon the warrant, I do not think he meant more. If you are of opinion that he meant substantively to impute a charge of felony, the plaintiff will be entitled to your verdict, but not otherwise.

Verdict for the plaintiff, with nominal damages.

Garrow A. G., and Starkie for the plaintiff.

Park and E. Lawes for the defendant.

[Attornies, Willoughby and Whitaker.]

ADJOURNED SITTINGS AT GUILDHALL.

GLOSSOP v. JACOB.

1815.

Monday,
June 26.

ASSUMPSIT against the defendant as the acceptor of a bill of exchange.

The bill was for the payment of 100*l. sterling*, it was objected that the word *sterling* was omitted in the declaration.

A foreign bill is accepted for the payment of 100*l. sterling*, the omission of the word *sterling* in the declaration is not a material variance.

Lord ELLENBOROUGH over-ruled ~~this~~ objection.

The bill was payable — days after sight. — A date appeared on the bill, under which the defendant's acceptance was written, but it was sworn that the date was not in the defendant's hand-writing, and there was no evidence to shew the time of acceptance.

Where a foreign bill is payable at a certain time after sight, and upon the production of the bill, an acceptance appears to have been written by the defendant under a date which is not in his hand-writing, the date is evidence of the time of acceptance,

Garrow A. G., objected to the bill being read in evidence, until the time of acceptance had been proved.

because it is the usual course of business in such cases, for a clerk to write the date, and for the party to write his acceptance under the date.

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GLOSSOP

v.

JACOB.

LORD ELLENBOROUGH. — The least possible evidence would be sufficient to remove the objection. If the question had hung in even balance, I should have presumed that the date was in the hand-writing of the acceptor, but the evidence expressly negatives the fact.

It afterwards was stated by some of the jury and by witnesses, that it was the usual course in such cases, for a clerk to insert the day, and for the party to write his acceptance.

LORD ELLENBOROUGH then allowed the bill to be read, observing that where a bill was payable after sight, it might be of great importance to the acceptor that the date should be written by a different person, that he might be prepared with evidence of the real date.

Verdict for the plaintiff.

Park and Marryatt for the plaintiff.

Garrow A. G., for the defendant.

[Attornies, *Walls* and *Collins*.]

1815.

PATERSON v. ZACHARIAH and ARNOLD.

Same day.

ASSUMPSIT on a bill of exchange, dated *October* 20, 1814, against the defendants as the acceptors. *Arnold* had suffered judgment by default. *Zachariah* pleaded the general issue.

A. knows that an intention between B. and C. to dissolve their partnership is in the course of execution, if A. afterwards insist upon the continuance of the partnership, it lies upon him to shew that the intention has been abandoned.

The defence was, that the acceptance was by *Arnold* alone, in fraud of *Zachariah*, after a dissolution of partnership, to which the plaintiff was privy.

It appeared that in the year 1813, the draft of a deed of dissolution had been prepared and transmitted by the plaintiff, who was the attorney of *Arnold*, to the attorney of *Zachariah*, for his approbation, but it did not appear that the deed had been executed.

LORD ELLENBOROUGH. — You need not labour this; whenever a communication has been made of the intention of parties to dissolve a partnership, which is in the course of execution, the burthen is thrown on the other side, of proving that the intention has been abandoned.

1815.

PATERSON

v.

ZACHARIAH
and ARNOLD.

A plaintiff who
fails in proving
the case stated
to the jury,
cannot after-
wards go into
a new case,
which has not
been stated.

Taddy for the plaintiff then proposed to go into
a new case of money lent to the defendant.

Lord ELLENBOROUGH. — No, after you have gone
upon the bill of exchange, without stating this case
before, I will not admit you to proceed upon ano-
ther ground.

Plaintiff nonsuited.

Garrow A. G. and *Taddy*, for the plaintiff.

Topping and *Andrews* for the defendant.

[Attornies, *Gresham* and *Isaacs*.]

Same day.

MAVING v. TODD and Others.

The liability of
a wharfinger
who under-
takes to con-
vey goods from
his wharf to
the vessel in
his own lighters
is similar to
that of a
carrier.

ASSUMPSIT against the defendants, who were
wharfingers and lightermen, for not safely
keeping a quantity of goods entrusted to them in
London, in order to be shipped to the plaintiff's,
the vendee's, at *Newcastle*.

The goods, whilst upon the defendants' premises,
had been accidentally destroyed by fire, and the

Notice to
the vendor of goods, that the carrier by whom he sends them, limits his responsibility, is
equivalent to notice to the vendee who directs them to be sent.

A carrier may not only limit, but exclude all responsibility by notice.

question was, whether the defendants, whose duty it was to convey the goods from the wharf in their own lighters to the vessel in the river, were liable for the loss.

1818.

MAVING

v.

Tees

and Others.

Lord ELLENBOROUGH was of opinion that the liability of a wharfinger, whilst he has possession of the goods, was similar to that of a carrier; and he inquired whether the defendants had any case to the contrary.

It afterwards appeared that the defendants had so limited their responsibility, that it did not extend to a loss by fire, and that the vendor in *London* had had notice to that effect.

Garrow A. G. submitted that notice to the vendor in *London* would not bind the vendee in the country.

Lord ELLENBOROUGH.—The vendee is bound by the acts of the vendor and his agents, and if his conduct has been improper, the vendee must resort to him for his remedy.

Hobroyd submitted, whether the defendants could exclude their responsibility altogether. This was going further than had been done in the case of carriers, who had only limited their responsibility to a certain amount.

Lord ELLENBOROUGH.—Since they can limit it to a particular sum, I think they may exclude it altogether,

1815. *MAVING* v. *Todd and Others.* gether, and that they may say, we will have nothing to do with fire.

Holroyd.—They were bound to receive the goods.

Lord ELLENBOROUGH. — Yes, but they may make their own terms. I am sorry the law is so, it leads to very great negligence.

Plaintiff nonsuited.

Garrow A. G. and *Holroyd* for the plaintiff.

Park for the defendant.

[Attornies, *Atkinson* and *Hodgson.*]

GUILDHALL.

Tuesday,
June 27.

PAINE v. BUSTIN.

The Court will not put off a trial upon motion at Nisi Prius, in order to enable the plaintiff to amend his declaration by omitting the *profert* of the bond on which the action is brought.

ACTION on bond. *Heath* moved to put off the trial in order to amend the declaration, by omitting the *profert*, and alleging that the bond was in the possession of the defendant.

Nor will it allow the alteration to be made by way of amendment at Nisi Prius, for it is a matter of material allegation.

Lord

Lord ELLENBOROUGH refused the application, observing that it should have been made earlier and at chambers. If a party will allege possession of that which he has not, he must take the consequences.

1815.
RAINE
v.
BUSHBY.

Heath then moved to amend the record in the same manner at *Nisi Prius*. But

Lord ELLENBOROUGH held that the alteration proposed was matter of material allegation, and not the subject of amendment at *Nisi Prius*.

[Attornies, *Turner and Dixon*.]

DAWES v. KING.

Same day.

CASE for deceit.

The declaration alleged, that the defendant, pretending that he was entitled to an annuity of 100*l.* for 100 years, provided *Bradshaw* the grantor so long lived, by a false and deceitful representation that it was a good annuity, induced the plaintiff to become the purchaser, although the defendant well knew that *Bradshaw* was in insolvent circumstances.

In an action against a vendor for a deceitful representation, the plaintiff must prove that deceit was used by the defendant for the purpose of throwing the plaintiff off his guard, and preventing him from being watchful.
It

1815.

Dawes

v.

King

It appeared that the defendant had represented that *Bradshaw* was a man in good circumstances, and of large property, and had told the plaintiff that he need be under no apprehension as to his responsibility; it also appeared that at that time *Bradshaw* was in confinement for debt, and had been in that situation for some time before.

LORD ELLENBOROUGH.— You must go much further than this to prove the deceit. You must shew that some deceit was practised for the purpose of putting the party off his guard, and preventing him from being watchful. (a)

The plaintiff not being able to carry his case further, was

Nonsuited.

[Attornies, *Morgan and Melson.*]

(a) See *Baglehole v. Walters*, 3 Campb. 156.

Same day.

CORSBIE v. OLIVER.

Debt on bond
by the plain-
tiffs as assign-
ees of a

bankrupt; plea, payment; it is not incumbent on the plaintiffs to prove themselves to be assignees.

DEBT on bond by the plaintiffs, who declared as assignees of a bankrupt. Plea, payment.

Littledale,

Littledale, for the defendant, contended, that it was incumbent on the plaintiffs to prove themselves assignees, as stated in the declaration. If this was not necessary then before the statute for pleading double, the defendant would have been excluded in such a case from one ground of defence.

1815.

CORRIE
v.
OLIVER.

LORD ELLENBOROUGH.—Before the statute, a difficulty might have arisen, and both title and merits could not have been put in issue ; they would have been excluded from one ground of defence, but so a defendant would in a multitude of other cases, where having several grounds of defence, he would have been compelled to elect the strongest. The general principle is, that a party who puts himself upon one issue, admits all the rest.

Verdict for the plaintiff.

Lawes for the plaintiff.

Littledale for the defendant.

[Attornies, *Thomas* and *Ellis*.]

1815.

ROBSON v. CURTIS.

A. receiving a bill of exchange in payment for part of a lot of cattle, jointly purchased by himself and B., indorses the bill to B. and B. indorses it over, the bill being dishonoured, B. promises to pay to A. half of the amount if he will take it up. A. after taking it up cannot maintain an action against B., whilst the partnership account remains unliquidated.

ASSUMPSIT for money paid.

Robson had indorsed to *Curtis* a bill, drawn by *Cole* on *Bruce*, payable to *Robson*.

Curtis had indorsed it over, and the bill having been dishonoured, the defendant promised, that if the plaintiff would take it up, he the defendant would pay to the plaintiff one half the amount, and for this sum the action was brought.

It appeared that the bill in question had been paid by *Cole* the drawer, to the plaintiff and defendant, who were in the habit of purchasing lots of cattle from the breeders, and afterwards selling them in smaller parcels. It did not appear that they had made any purchases except *jointly*; after the sale to *Cole*, part of the same lot of cattle remained unsold, and it did not appear that the account had ever been settled.

Garrow A. G. for the plaintiff, submitted that all partnership had ceased with respect to the transaction on this bill, and that since it was to be presumed that *Curtis* had received the whole amount, the plaintiff was entitled to recover as upon a transaction entirely insulated.

LORD ELLENBOROUGH.— If there had been partnership dealings, and only one item remained unadjusted, the difficulty as to partnership would disappear, but that is not the case here, since some of the beasts remained after the sale to *Cole*.

Plaintiff nonsuited.

Garrow A. G. and *Puller* for the plaintiff.

Park for the defendant.

[Attornies, *Thompson* and *Curtis*.]

1815.

ROBSON
v.
CURTIS.

SEBAG v. ABITBOL.

THE defendant under his notice of set-off, relied on a bill of exchange for 100*l.* accepted by the plaintiff in favour of the defendant, payable, when due, at Messrs. *Whitehead and Co.*

The bill became due 1st March, 1814, but was never presented. *Whitehead and Co.* became bankrupts in November, and had funds of the plaintiff's in their hands at the time of the bankruptcy.

Park for the defendant contended, that the plaintiff, as acceptor, was not discharged by the

A. accepts a bill in favour of B., payable at his bankers; the bill is never presented; eight months after the bill becomes due, A.'s bankers having funds of his in their hands become bankrupt, A. is not discharged by B.'s laches.

A request by A. subsequent to the bankruptcy, that B. will return the acceptance is no waiver of the laches.

defendant's

1815.

SERRAS

v.

ABITBOL.

defendant's *laches*; if he were, then in every case where the bill was not presented on the very day, the acceptor would be discharged by the bankruptcy of the bankers at whose house it was made payable.

Lord ELLENBOROUGH saved the point for the opinion of the Court.

Park, in the course of the cause, contended that the *laches* had been waived by a letter, which the plaintiff had written subsequent to the bankruptcy, in which he requested that the bill in question, together with a draft for 18*l.* might be returned, but

Lord ELLENBOROUGH was of opinion that this was no waiver, it was nothing more than a request to have the acceptance returned, which was then useless, and it was very natural that he should make it.

Verdict for the plaintiff subject to a motion.

Topping and *Campbell* for the plaintiff.

Park and *Tindal* for the defendant.

The verdict was afterwards set aside, the Court of King's Bench being of opinion that the acceptor was not discharged.

[Attornies, *Reardon & Davis* and *Evitt*.]

NICHOLLS v. DOWDING and KEMP.

1815.

Wednesday,
June 28.

ASSUMPSIT on bills of exchange, and for goods sold and delivered.

A witness called to prove that A. and B. are partners, is asked whether A. has interfered in the business of B., this is not a leading question.

In order to prove that the defendants were partners, the first witness was asked, whether the defendant *Kemp* had interfered in the business of *Dowding*.

The question was objected to as a leading one.

Primâ facie evidence of a partnership having been given, the declaration of one partner is evidence against another partner.

LORD ELLENBOROUGH. — I wish that objections to questions as leading, might be a little better considered before they are made. It is necessary, to a certain extent, to lead the mind of the witness to the subject of inquiry. If questions are asked, to which the answer yes or no would be conclusive, they would certainly be objectionable, but in general no objections are more frivolous than those which are made to questions as leading ones.

Primâ facie evidence of a partnership having been given,

Garrow A. G. inquired into declarations by one of the defendants, for the purpose of binding the other, which, upon the objection taken, he contended he had a right to do, since otherwise the evidence would be excluded altogether.

1815.
 NICHOLLS
 v.
 DOWDING
 and KEMP.

LORD ELLENBOROUGH. — I think the evidence is admissible, the case is analogous to that of conspiracy, where, after a foundation has been laid, what has been said by one is evidence against the rest.

Garrow A. G. and *J. Parke* for the plaintiff.

Park for the defendant.

[Attornies, *Denies* and *Curwen*.]

Same day.

POTTER v. DEBOOS.

A. states to the father of the plaintiff, that he has pledged himself to marry his daughter in six months, or in a month after Christmas. Although this varies from the promises laid in the special counts, it is evidence from which the jury may infer a promise to marry generally.

DECLARATION on promises to marry in six or seven months — to marry in a reasonable time—and to marry generally.

The defendant had called upon the plaintiff at her father's house, and after an interview with her, he said to the father, upon going away, I have pledged my honour to marry her in six months, or in a month after Christmas.

Topping, for the defendant, submitted that the evidence varied from the first count, and that as a special promise appeared in evidence, no more general promise could be presumed. But

LORD ELLENBOROUGH left it to the jury, whether they would not presume, from the circumstances, a general promise to marry, (which the law would consider as a promise to marry within a reasonable time) and whether the declaration of the defendant had any other effect than to render that definite and certain, which before was uncertain.

1815.

POTTER
v.
DEBOOS.

Verdict for plaintiff.

Garrow A. G. and D. F. Jones for the plaintiff.

Topping for the defendant.

[Attornies, *Saggers* and *Church*.]

CORAM DAMPIER J.

MAINWARING v. MYTTON.

July 1st.

ASSUMPSIT on two bills of exchange (drawn by the defendant on *Hill and Co.*,) upon default of payment by the acceptors.

The joint acceptor of a bill of exchange is not competent to prove a set-off in an action by the holder against the drawer.

The defendant having given notice of set off, called *B. H.* to prove that a bill of exchange had been drawn by *Hill and Co.* upon the plaintiff, accepted by him, and indorsed by *Hill and Co.* to the defendant. Upon the cross-examination of

G 2

B. H.

1815.

MAIN-
WARINGv.
MYTTON.

B. H. it appeared that he was one of the firm of
Hill and Co.

Garrow A. G., objected to the witness as incompetent.

Scarlett contended that he was a competent witness, since if he defeated the action, he would be liable to *Mainwaring*.

Mr. J. DAMPIER was of opinion, that the witness was incompetent, since he was interested in lessening the balance, being answerable to *Mytton* for what the plaintiff should recover.

The plaintiff had a verdict for the full amount of the two bills.

Garrow A. G., and *Marryatt* for the plaintiff.

Scarlett for the defendant.

[Attorneys, *Gale and Stevenson*.]

NICKSON v. THOMAS.

ASSUMPSIT for articles supplied for the use of the defendant's ship.

To shew that the defendant was a part-owner, the plaintiff proved that his name had been registered as the owner of one-eighth upon the oath of *Cooke* and others; and that he had afterwards executed a deed conveying the one-eighth to *Cooke*, in consideration of 5s., and that he had covenanted for the goodness of the title.

It was proposed to call *Cooke* for the defendant, to prove that he had caused the registry to be made, without any authority from the defendant, and it was proved, that where a name had been entered by mistake, it was necessary for the party to convey his interest, for the purpose of correcting the mistake; it was also proposed to give in evidence the letters which constituted the only communication between *Cooke* and the defendant on the subject, to shew that no authority had in fact been given.

Topping, for the plaintiff, objected that such evidence was not admissible, since the defendant, by conveyance and covenant, had adopted the name of *Cooke*, &c.

A. whose name has been registered as the part-owner of a vessel on the oath of B., and has afterwards conveyed such share by deed to B., covenanting for the goodness of his title, cannot be admitted to prove by the evidence of B. that he had in fact no interest in the vessel.

1815.

NICKSON

v.

THOMAS.

Lord ELLENBOROUGH, after observing that in a case like that stated, the conveyance by the defendant ought to have been special, reciting the mistake, and professing to convey such interest only as the defendant, under the circumstances, was possessed of; said, I think that this is not evidence, and that it would be exceedingly dangerous to all parties to admit it, not only to the public, but to the individual, as tending to involve him in the penalties of perjury.

Verdict for the plaintiff.

Topping and Curwood for the plaintiff.

Park and Taddy for the defendant.

[Attornies, Courtten and Tomlinson & Co.]

DOE v. PAYNE.

In ejectment
on a clause of
re-entry in case
the tenant
should assign,
set over, or
otherwise let

the demised premises, it is not sufficient to prove the defendant a stranger in possession of the demised premises, and his declaration that they were demised to him by another stranger.

And such evidence would not be sufficient, even if the tenant had covenanted not to part with the possession.

EJECTMENT on a clause of re-entry contained in a lease to one *Dyer* for breach of his covenant, "Not to assign, set over, or otherwise let the demised premises."

The

The lessor of the plaintiff proved that the defendant *Payne* was in possession of the premises, carrying on his business there, having placed his name over the door, and that *Payne* had said that he took the premises from two of the directors of the Commercial sale room.

1815.

DOE

v.

PAYNE.

Lord ELLENBOROUGH. — This does not prove that *Dyer* either assigned or let, and it is incumbent on the lessee of the plaintiff to shew that he did either the one or the other.

Upon this evidence *non constat* that *Payne* was not a tortious intruder. It does not appear who the directors of the Commercial sale room are; and for ought that appears, *Dyer* may have been unwilling to be turned out of possession. This evidence would not be sufficient even though *Dyer* had covenanted not to part with the possession.

Plaintiff nonsuited.

Park and *Puller* for the plaintiff.

Marryatt for the defendant.

[Attornies, *Richings* and *A. Brown*.]

1815.

DE TASTET V. CARROLL.

A transfer of property made on the eve of bankruptcy, but under the apprehension that a degree of force, civil or criminal, is about to be applied, is valid.

A transfer by one of two partners on the eve of bankruptcy, under circumstances which overcome the free will of the party, such as the apprehension of a prosecution for forgery, is valid.

TROVER against the assignees of *Parry* and *Latham*, bankrupts, to recover the value of a large quantity of rum, sugar, &c.

The question was, whether *Parry* in transferring this property to the plaintiff had thereby given him a voluntary and fraudulent preference?

Parry committed an act of bankruptcy on the 17th of *January* 1813, he had before then been employed by the plaintiff to purchase rum and other articles for him to a very large amount; and on the 14th of *January*, he had property which stood at the Custom-house in his own name, but which had been purchased on the plaintiff's account to the amount of 60,000*l.* On the 14th, it appeared by the confession of *Parry*, that a bill of exchange purporting to have been accepted by *Marden*, for the sum of 22,000*l.* and which had been deposited by *Parry* with *De Tastet* as a security, was a forgery. Upon this discovery, Mr. *De Tastet*, exceedingly alarmed for the fate of his property, insisted upon its being immediately transferred, and it was accordingly transferred to him on the 14th and 15th days of *January*.

Lord

Lord ELLENBOROUGH observed to the jury. Formerly the act of bankruptcy drew the line of separation between that property which might be disposed of by the bankrupt, and that which vested in the assignees. But it occurred to those who presided in the courts, that it was unjust to permit a party on the eve of bankruptcy to make a voluntary disposition of his property in favour of a particular creditor, leaving the mere husk to the rest; and therefore that a transfer made at such a period, and under such circumstances as evidently shewed that it was made in contemplation of bankruptcy, and in order to favour a particular creditor, should be inoperative. But the rule was not meant to debar a creditor from using such means as were in his power for compelling satisfaction of his claim, but merely to exclude a voluntary and fraudulent preference. The question for your consideration is, whether the transfer was voluntary, or made under the apprehension that a degree of force, *civil or criminal*, was about to be applied.

1815.
 DE TASTET
 v.
 CARROLL.

Garrow A. G. submitted that it was not competent to Parry, under an apprehension of a prosecution for forgery; to deal with the goods of his partner, and that the jury should be directed to find whether it was under this apprehension that the transfer was made; but

Lord ELLENBOROUGH was of opinion that every thing which might overcome the free-will of the party, was sufficient to exclude a voluntary preference;

1815.
 DE TASTET
 v.
 CARROLL.

ference; and that *Parry*, as a partner, had the power of disposing of the partnership property.

Verdict for the plaintiff.

Garrow A. G., *Best* Serjt., and *Taddy* for the plaintiff.

Vaughan Serjt. and *Holroyd* for the defendant.

In the ensuing term, the Court of *K. B.* refused a rule *nisi* for a new trial.

[Attornies, *Cooper & Lowe*, and *Dawes & Co.*]

HODNETT v. FORMAN.

An attesting witness to a bond resides in Ireland, (*semble*) his hand-writing may be proved, although no steps have been taken to procure his personal attendance.

DEBT against the defendant as executor upon the bond of the testator. Plea, *non est factum*.

The bond in question purported to have been executed in *Ireland*, and to have been attested by two subscribing witnesses. The plaintiff having called one of the witnesses who swore to the execution of the bond, and having also given evidence to shew that the bond had been signed by the testator, proposed to prove the hand-writing of the other attesting witness, who, it appeared, was then in *Ireland*, but had not been applied to to attend.

Lord

Lord ELLENBOROUGH was at first of opinion, that this evidence was inadmissible, in the absence of proof of any steps having been taken to procure the attendance of the witness. But *Park* citing the case of *Prince v. Blackburn*(a) in which it had been laid down that evidence of the handwriting of a subscribing witness is admissible where the witness resides beyond the jurisdiction of the court, His Lordship, on the strength of this authority, admitted the evidence.

1815.

HODNETT
v.
FORMAN.

The plaintiff afterwards elected to be non-suited.

Park for the plaintiff.

Garrow A. G. for the defendant.

[Attornies, *Hackett and Seton & Co.*]

(a) 2 East, 250.

CASES

ARGUED AND DECIDED

AT

NISI PRIUS

IN K. B.

At the Sittings after Michaelmas Term,

56 GEORGE III.

SITTINGS AFTER TERM AT MIDDLESEX.

1815.

CLARKE v. HARVEY.

A declaration under the st. 49 G. 3. c. 126. s. 6., alleges that the defendant advertised a proposal

for a promise to give the sum of 150 guineas, to any one who would procure A. B. a place under government;

the words *for a promise*, may be rejected as surplusage.

The words *under government* are sufficient, though the words of the statute are, "office in the gift of the Crown."

DEBT to recover a penalty of 50*l.* from the defendant as publisher of the *Day* newspaper, for advertising a proposal to pay a sum of money for the procurement of an office under government, under st. 49 G. 3. c. 126. s. 6.

The declaration alleged, that the defendant had advertised a proposal *for a promise* to give the sum of 150 guineas to any one who should procure *A. B.* a place under government, &c. the advertisement was set out.

Topping

Topping for the defendant objected, that this description varied from the advertisement which was a *proposal to receive a promise*, the advertisement in fact offering 150 guineas to any one who would procure for *A. B.* a place under government, &c.

1815.

CLARKE
v.
HARVEY.

Lord ELLENBOROUGH held, that the words “ a proposal for a promise ” were nonsense, but said that he would reject the words *for a promise*, and then it would stand merely as an advertisement of a proposal to give 150 guineas, &c.

Topping objected, that the words of the advertisement were office *under government*, those of the statute *office in the gift of the crown*, but

But Lord ELLENBOROUGH held, that this was an advertisement within the statute, notwithstanding the variance in the terms.

Verdict for the plaintiff.

Garrow A. G. and Espinasse for the plaintiff.

Topping and Curwood for the defendant.

[Attornies, *Nicholls and Smith.*]

BURN v. PHELPS.

1815.

ASSUMPSIT for use and occupation.

A. lets lands to B., who under-lets to C. and others; during these tenancies, A. gives notice to C., and the other under-tenants to quit, and C. does quit, and the lands before occupied by him remain unoccupied for a year, and are then again let by B.; A. cannot recover against B. for the use and occupation of this land for the year. And *semble* under these circumstances, an eviction might be pleaded to the whole demand.

The defendant being tenant to the plaintiff of premises in *Worcestershire* at 13*ol. per annum*, under-let the premises to *Badger* and several other under-tenants; during this tenancy and the under-tenancies, the plaintiff gave notice to *Badger* and the other undertenants to quit, and *Badger* had in fact quitted, and the premises occupied by him worth 6*ol. per annum* remained unoccupied for one year; at the expiration of the year *Phelps* again under-let them to another tenant; and he still continued in possession of the whole by his under-tenants; the defendant had paid into Court a sum which covered all the rent claimed except the 6*ol.*, which he insisted upon was not due to the plaintiff.

LORD ELLENBOROUGH was of opinion, that under the circumstances the plaintiff was guilty of an eviction as to the premises occupied by *Badger*, at the least, and suggested that an eviction might have been pleaded to the whole demand. Upon signifying this opinion to the jury, the plaintiff elected to be nonsuited.

The *Attorney-General* and *Scarlett* for the plaintiff.

Park and *Marryatt* for the defendant.

[*Attornies, Fladgate and Taylor.*]

IN THE COMMON PLEAS.

1815.

COPELAND v. WATTS and Another, Executors of
GUBBINS.

December 4.

ACTION by the lessor on covenants in the lease against the defendants as the executors of *Gubbins* the lessee. Plea *non est factum*, (there were several special pleas.) It appeared that both the lease and counterpart had several years ago been found amongst the documents of Mr. *King* an attorney, lately deceased; that before the bringing of the action search had been made in the iron box in which both lease and counterpart had before been deposited, when the lease was found bearing date in the year 1784, but the counterpart was missing. In order to prove the execution of the counterpart, a witness was called upon to produce an under-lease of the same premises of the same date with the original lease by *Gubbins* to one *Cole*, and which recited the original lease.

A solicitor to a third person, is bound to produce his client's lease, executed by the defendant, provided the production will not operate to the prejudice of his client.

But if the reading of such a document would operate to the prejudice of a third person, the Court will direct it to be read.

The witness demurred to the production of this under-lease, stating that he was solicitor to Mr. *Cole* and that he conceived it to be doubtful at the least, whether the interest of his client might not be prejudiced by the production of the under-lease.

GIBBS

1815.
 COPELAND
 v.
 Executors of
 GUBBINS.

GIBBS C. J. after examining the underlease said, that he was of opinion that the production of this document would not be prejudicial to Mr. *Cole*, at least that it could only affect him circuitously and therefore directed it to be read, he observed however, that if it had appeared that the interest of a third person would have been prejudiced by it, he should not have directed the document to be read.

An acceptance of a surrender of a lease is not to be presumed from the circumstance of the rent having been paid, not by the original tenant, but by a third person.

Lens Serjt. for the defendant, afterwards insisted upon the fact of rent having been regularly paid to the plaintiff by *Cole*, and not by *Gubbins*, as one circumstance (*inter alia*,) from which the jury would be justified in presuming that the plaintiff, by accepting a surrender, had discharged *Gubbins*, but

GIBBS C. J. in summing up to the jury, observed that it would be productive of dangerous consequences to presume a surrender to the lessor, from the fact of his receiving payment from an assignee; a landlord in general, was willing to receive payment from the person who offered it, whosoever he was, but by receiving it, he did not discharge the lessee.

Verdict for the plaintiff.

Best Serjt. and *Peake* for the plaintiff.

Lens and *Vaughan* Serjts. for the defendant.

[Attornies, *Copeland* and *Sarell*.]

IN THE KING'S BENCH.

SITTINGS AT WESTMINSTER.

LANE v. APPELATE.

1815.

Tuesday,
December 5.

CASE for words imputing a charge of an unnatural crime. Plea, the General Issue.

Action for words imputing a crime; an agreement on the part of the plaintiff, to waive his action for words spoken, in consideration that the defendant will destroy certain documents in his possession, or which might afterwards come into his possession, imputing the same crime to the plaintiff, is (when executed by the burning of the papers in his possession,) a bar to the action, and may be given in evidence under the general issue.

The words were proved. — On the part of the defendant, it appeared that the defendant and her late husband having succeeded to the occupation of a house, formerly occupied by the plaintiff, had become possessed of certain letters, purporting to contain proofs against the plaintiff, of an offence of the nature charged; it also appeared that the plaintiff after the speaking of the words, entered into a written agreement with the defendant, which stated that the plaintiff had burnt one of these letters, and was then to destroy another, and that she had undertaken to destroy all other letters of the same kind which might subsequently come into her possession; and that the plaintiff and defendant had mutually agreed not to bring actions against each other on any ground connected with these charges or letters.

VOL. I.

H

Lord

1815.

LANE

v.

APPELATE

Lord ELLENBOROUGH C. J. was of opinion, that this agreement was a bar to the action, as an accord and satisfaction, and was evidence under the General Issue.

A juror was withdrawn by agreement.

The *Attorney-General* and *Comyns* for the plaintiff.

Park and *Puller* for the defendant.

[*Attornies, Willingham and Upton.*]

Same day.

HUXLEY v. BERG and Others.

A plaintiff in an action of trespass may give in evidence a consequential injury to his wife, not as a substantive ground of action, but to shew how violent the defendants' conduct was.

TRESPASS for breaking and entering the plaintiff's dwelling-house, and for a battery.

The plaintiff was allowed to give in evidence that his wife was so terrified by the conduct of the defendants, that she was immediately taken ill, and soon afterwards died; but this was held to be admissible for the purpose only of shewing how outrageous and violent the breaking, &c. was, and not as a substantive ground of damage.

One of several

defendants, against whom on the close of the plaintiff's case no evidence has been offered, is not entitled to an acquittal, till the whole case is ready for the jury. But in adducing evidence in contradiction to that offered by the other defendants, the plaintiff cannot go into a new case against the first.

The

The evidence for the plaintiff being closed, and there being no evidence against *Jones* one of the defendants, the *Attorney-General*, before he addressed the jury, submitted that he ought to be immediately acquitted.

1815.
HUXLEY
v.
BERG
and Others.

But Lord ELLENBOROUGH C. J. held that he ought not to be acquitted, before the *whole case* was ready for the jury.

But after evidence brought on the part of the other defendants, the plaintiff in adducing evidence in contradiction, was not permitted to give fresh evidence in order to implicate *Jones*.

Verdict for the plaintiff.

Topping and *Curwood* for the plaintiff.

The *Attorney-General* for the defendants.

[Attornies, *Bugby* and *Delman*.]

SITTINGS IN MIDDLESEX.

1813.

Wednesday,
December 6.

ACERRO and Others v. PETRONI.

The counsel for the plaintiff may suggest to the witness called, to prove the partnership of several members of a firm who are plaintiffs, the names of the component members of the firm. It is not sufficient to prove the several surnames, without proving also the christian names of the members of the firm, as stated in the declaration.

ASSUMPSIT by the plaintiffs bankers at *Paris*, upon an account stated by the defendant.

The witness called to prove the partnership of the plaintiffs, could not recollect the names of the component members of the firm, so as to repeat them without suggestion, but said he might possibly recognize them if suggested to him.

Lord ELLENBOROUGH alluding to a case tried before *Lord Mansfield*, in which the witness had been allowed to read a written list of names, ruled, that there was no objection to asking the witness, whether certain specified persons were members of the firm.

The witness recollected the surnames, but not the christian names of those mentioned, as members of the firm, and their christian names being specified in the declaration in the count upon the account stated, and the terms of the acknowledgment being generally to *Acerro and Co.* the plaintiffs were

Nonsuited.
The

AFTER MICHAELMAS TERM, 56 GEORGE III.

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The *Attorney-General* for the plaintiffs.

1815.

- *Park* for the defendant.

ACERRO
and Others
v.
PETRONI.

[Attornies, *Maybew* and *Raphael*.]

NEWMAN v. NEWMAN.

Thursday,
December 7.

DEBT by *Ann Newman*, executrix of *Henry Newman*, on the defendant's bond, bearing date in the year 1784.

Payment of money secured by bond, is not to be presumed, although more than 20 years have elapsed since an acknowledgment that any sum was due upon it, if the obligee ever since that acknowledgment has resided abroad.

It appeared that in the year 1784, *Francis Newman* being tenant for life, remainder to *Henry Newman*, the testator for life, remainder to the defendant, the son of *H. Newman* in tail; it was agreed that the defendant should be made tenant in-fee, and on this occasion a bond was granted by the defendant dated in 1784, securing to the testator 1000*l.* generally, and also the further sum of 7500*l.* payable on the death of *Francis Newman*.

In 1792, the father, *H. Newman*, made an affidavit to hold the son to bail for the debt of 1000*l.*, when the defendant wrote a letter, from which it appeared that the sum of 1000*l.* was then unpaid.

H 3

From

1815. From that period up to the time of the action
 brought, the defendant had resided in America.

NEWMAN

NEWMAN.

For the defendant it was contended, that payment was to be presumed from lapse of time.

But Lord ELLENBOROUGH was of opinion that there was no ground for this presumption, since it appeared that the debt was unpaid in 1792, and the defendant had since that time been resident abroad, there was therefore no period of time since the year 1792, when the presumption could be said to be rebutted.

Verdict for the plaintiff.

Park for the plaintiff.

Garrow A. G. for the defendant.

[Attornies, *Allen and Pearse.*]

Same day.

DRURY v. MOORE.

Evidence that the lord of a manor has from time to time erected houses to the exclusion of those claiming a right of common, is not to be placed in competition with evidence of long enjoyment, coupled with an acknowledgment of the defendant, the lord of the manor by deed, that the confirmation of the commoners was essential to an alienation of part of such common.

CASE against the defendant for excluding the plaintiff from the enjoyment of a common right on *Hadley Common*, to which he was entitled as appurtenant to a certain messuage and lands.

The

The defendant was lord of the manor of *Hadley*, and had lately inclosed *Hadley Green*.

1815.

DRURY

v.

MOORE.

The plaintiff proved enjoyment of the common by himself and those under whom he claimed, by the evidence of very old witnesses. He also proved that in 1800, a mill having been built on a part of the green, for charitable purposes, an indenture had been executed by *Mr. Moore* and others, by which *Mr. Moore* granted the land, subject to the confirmation of the commoners.

Park for the defendant stated, that he was able to prove that the lords of the manor had from time to time, from a very ancient date, taken and leased parts of the green, upon which houses had been built, to the total exclusion of the commoners.

LORD ELLENBOROUGH. — I am ready to receive such evidence, which tends to shew an unqualified right in fee-simple, but in the result I think it will be of no avail. Lords of manors continually encroach upon the rights of commoners, but such evidence, when weighed against long enjoyment, and the solemn deed of the party, would prove as light as a feather in the scale.

Verdict for the plaintiff.

Topping, Richardson, and Monro for the plaintiff.

Park and Marryatt for the defendant.

[Attornies, *Seaton & Co.* and *Pringle.*]

1815.

Same day.

LUBBOCK and Others v. INGLIS.

A. directs the London Dock Company to deliver a quantity of hides belonging to him in their custody to B., (supposing that B. has purchased them from him,) the dock company delivers them upon an order, purporting to be the order of B., but which is a mere forgery; B. in fact not having purchased the goods. The dock company are liable to A., although he neglected to apply to B. till four months afterwards, when the supposed time of credit expired. And although A. might after discovering the fraud, have recovered

TROVER against the *London Dock Company*, to recover the value of a quantity of hides.

In June 1814, the hides in question were lying in the warehouse of the *London Dock Company*, in the name of *Lubbock and Co.* the owners.

In the same month, *Taylor and Co.* the brokers of *Lubbock and Co.* sent to the latter a sale note, from which it appeared, that they had sold these hides to *Broadhead*, a dealer in the country, to be paid for by bill at four months.

In November 1814, the plaintiffs sent an order to the *London Dock Company*, to deliver the hides to the order of *Broadhead*. In the subsequent *March*, the plaintiffs, writing to *Broadhead* for payment, it was discovered that *Broadhead* had not purchased any goods from the plaintiffs. The plaintiffs then directed the *London Dock Company* to rehouse the goods in the name of the plaintiffs, but it appeared that in the mean time the *London Dock Company* had delivered the hides upon an order, purporting to have been made by *Broadhead*, but which turned out to be a mere forgery.

possessed of his hides from another person.

The *Attorney-General* for the defendants contended, that inasmuch as the plaintiffs had directed the defendants to deliver the hides to the order of *Broadhead*, and had neglected to make inquiry after *Broadhead* till it was too late to defeat the fraud, they had by their *laches* subjected themselves to the loss.

1815.
LUBBOCK
and Others
v.
INGLIS.

LORD ELLENBOROUGH was of opinion, that since the order by the plaintiffs to the defendants was to deliver the hides to *Broadhead*, the defendants were bound not to deliver them to any one but upon the order of *Broadhead*, and that since *Broadhead* had made no order, they were liable to the plaintiffs for the amount. If *Broadhead* had in fact made an order, the defendants would have been justified in delivering the goods according to such order.

The *Attorney-General* offered to prove that the plaintiffs, after this discovery, might have had the hides back from *Taylor and Co.*

But LORD ELLENBOROUGH was of opinion, that as the defendants had delivered the hides without authority, the plaintiffs were not bound to get them back.

Verdict for the plaintiffs.

Park and Topping for the plaintiffs.

Garrow A. G. and *Bosanquet Serjt.* for the defendant.

[*Attornies, Crowder & Co. and Weston.*]

 GUILDHALL.

Coram BAYLEY J.

1815.

Saturday,
December 9.

SWEETING v. FOWLER, and Another.

Proof of a promissory note payable to A. B. generally is *prima facie* evidence of a promise to A. B. the father, and not to A. B. the son, the names being the same, but A. B. the son, although styled in the declaration A. B. the younger, bringing the action, and being in possession of the note, is entitled to recover upon it.

ASSUMPSIT by *Henry Sweeting* the younger, on a promissory note, which was payable to *Henry Sweeting* generally.

It appeared that there were two *Henry Sweetings*, father and son.

BAYLEY J. held, that this was evidence of a promise to *Henry Sweeting* the father, and not to *Henry Sweeting* the younger, as stated in the declaration.

The plaintiff then proved, that *Henry Sweeting* the younger had given instructions to bring the action, and was in possession of the note.

BAYLEY J. thought this sufficient, but gave *Jones*, for the defendant, liberty to move the point.

Verdict for the Plaintiff.

Littledale

Littledale for the plaintiff.

Jones for the defendants.

[Attorneys, *Cooper & Lowe* and *Bateman*.]

1815.

SWEETING

FOWLER.

OKELL v. SMITH, and Another.

Same day.

ASSUMPSIT for the price of 16 copper pans.

These pans had been made by the plaintiff under a contract, by which he engaged that they should be sound, and be made of the best materials, to be paid for at a certain stipulated price, by bill at two months.

The defendants after five or six trials, found that the pans were not sound, and would not answer the purpose for which they were intended; viz. the manufacture of vitriol.

Park for the plaintiff contended, that the defendants having used the pans several times, were precluded from disputing the payment at the rate stipulated for. But

the commodity being bulky, and after a reasonable trial found to be unfit for such purpose, the vendor upon notice given, is bound to take them away; but if the vendee retain the utensils, without giving such notice, he is liable to pay for the value of the materials.

Where utensils to be used in trade have been contracted for and delivered at a stipulated price, it is a question for the jury, whether the vendee, who complains that they are unfit for the purpose for which they were intended, has used them further than was necessary, in order to give them a fair trial.

And if not,

BAYLEY J.

1815.
 OKELL
 v.
 SMITH
 and Another.

BAYLEY J. held, that it was a question for the jury, whether the defendants had used the pans more than was necessary, in order to give them a fair trial.

Park for the plaintiff, assimilated the case to that of *Morgan v. Richardson*, (a), and as the agreement was for an entire sum, contended that the defect in the pans was properly the subject of a cross action; and he attempted to distinguish the case from that of *Farnsworth v. Garrard*, (b) and others of that description, where the articles were *wholly unfit* for use.

The *Attorney-General* and *Campbell* answered, that in *Morgan v. Richardson*, a bill of exchange was given. In *Fisher v. Sanuda*, (c) where a wall had been built so improperly that no benefit whatever had been derived from the service, it was held that the plaintiff was not entitled to recover even the value of the brick and mortar, and in general where the article is bulky, it is not necessary to return it, it is sufficient to give notice to the other party.

BAYLEY J.—The plaintiff certainly is not entitled to recover the full price stipulated for by the contract, according to which he was bound to furnish pans capable of answering the purposes

(a) 1 Campb. 40. n.

(b) 1 Campb. 38.

(c) 1 Campb. 190.

for

for which they were ordered. If the defendants after giving them a reasonable trial, found them insufficient for the purpose, and gave notice to that effect, to the plaintiff, he was bound to take them away, and they remained at his risk; but if no notice was given, but the defendants retained the pans, they are liable to pay as much as the materials are worth.

1815.
OKELL
v.
SMITH
and Another.

The action was afterwards referred.

Park for the plaintiff.

Garrow A. G., and *Campbell* for the defendants.

[Attornies, *Beetbam* and *Allies*.]

KIERAN v. JOHNSON and Another, Assignees of Monday,
MACMASTER. December 11.

ASSUMPSIT for money had and received by the defendants, as the assignees of *Macmaster*, a bankrupt, to the use of the plaintiff.

Proof that the plaintiff wrote a letter to the defendant, purporting to contain

a bill of exchange, with directions how the product should be applied, and that the defendant soon afterwards had a bill in his possession, which answered the description contained in the letter, affords presumptive evidence, that both the letter and the bill found their way to the defendant.

In order to make the assignees of a bankrupt liable for money had and received by the bankrupt for a specific purpose, it is necessary to prove that the money came into their hands, with a knowledge of the purposes for which it was destined.

For

1815.

HILL

v.

IDLE.

incumbent on the ship-owner to have procured such order.

Lord ELLENBOROUGH was of opinion that it was clearly incumbent on the person whose conduct created the necessity of such an order, to take the proper steps to procure it.

It was afterwards contended, that at all events the defendants were to be allowed a reasonable time for procuring such special order from the Lords of the Treasury.

But Lord ELLENBOROUGH held, that since the duty resulted from the importation of the wines under particular circumstances, which occasioned the restraint, it was the business of the importer to remove that restraint which had been caused by his own conduct, and that the case did not involve any question as to reasonable time.

Verdict for the plaintiff, for the amount of 18 days demurrage. (a)

Garrow A. G. and Lawes for the plaintiff.

Park and Marryatt for the defendants.

[Attornies, *Sheffield* and *Lamb*.]

(a) See *Rodgers v. Forester* 2 Campb. 483, and *Burmester v. Hodgson*, 2 Campb. 488.

WHITE v. CHAPMAN.

1815.

ASSUMPSIT for flour sold and delivered, and for money had and received.

A factor who has been guilty of gross misconduct in selling the goods of his principal, is not entitled to deduct for commission in an action for money had and received to the use of his principal.

The defendant had sold flour to several persons, informing them that he sold by commission for another, but without communicating the name of his principal. The flour was afterwards sent to the different vendees of *Chapman* by *White*.

Lord ELLENBOROUGH was of opinion that the plaintiff could not recover against *Chapman*, for goods sold and delivered to him, but that he might recover such sums as he could prove *Chapman* to have received in payment for the flour, from the different vendees, though still the defendant would be entitled to deduct the amount of his commission on the sales, unless indeed it appeared that he had grossly misconducted himself as an agent; for in such cases it had been held, that a factor could not deduct for commission.

The cause was afterwards referred.

Garrow A. G. and *E. Lawes* for the plaintiff.

Park and *Abbott* for the defendant.

[Attornies, *Stratton* and *Wilson*.]

1815.

MORGAN v. DAVISON.

Presentment
of a bill of ex-
change at a
countinghouse,
(where it is
made payable)
between six
and seven
o'clock in the
evening is
sufficient.

ASSUMPSIT by the indorsee of a bill of exchange against the drawer. The bill was made payable at *Herring and Richardson's, Copthall-Court, London.*

The plaintiff proved presentment at *Herring and Richardson's*, (who were not bankers) in *Copthall-Court*, on the day when the bill became due, between six and seven in the evening, when no one was there but a girl left to take care of the counting-house.

Lord ELLENBOROUGH held that this was a sufficient presentment, the hour was not an improper one, and the holder might reasonably expect to find the party in his counting-house at that time.

Topping for the plaintiff.

Scarlett for the defendant.

[Attornies *Wilson* and *Meggison*.]

DAVIS v. REYNOLDS.

1815.

TROVER for 19 mats of flax. *Cowper and Co.* in *London* had bought of *Peacock and Co.*, who resided in the north of *England*, the flax in question, which had been consigned to *Cowper and Co.* and landed on the defendant's wharf in *London*. *Cowper and Co.* had transmitted to *Peacock and Co.* their acceptance for the amount, and had sold the flax to the plaintiff, who had paid them the amount and taken a receipt. The bill of lading was tendered in evidence but rejected for want of stamp.

Goods consigned to A. upon their arrival are landed on the defendant's wharf; the plaintiff in an action of trover, may prove his title by parol, although the bill of lading which has been indorsed to him cannot be received in evidence for want of a stamp.

Bolland for the defendant objected, that no property had been proved in the plaintiff, the proper evidence of transfer would have been the indorsement of the bill of lading, which was not in evidence.

The vendor of goods having taken the vendee's acceptance in payment, cannot stop the goods *in transitu*, unless the bill has been dishonoured.

LORD ELLENBOROUGH C. J. — The right of possession follows the right of property. When the goods arrived at the wharf, they were delivered to the wharfinger as the bailee for the benefit of the person entitled. At that time *Cowper and Co.* were entitled, for they had paid their accepted bill for the goods which does not appear to have been dishonoured, they had thereby acquired a right of property which they were competent to assign.

1815. *Bolland* cited *Hunt v. Ward* (a), to shew that
 { DAVIS the vendor had a right to stop *in transitu* : unless
 v. the goods were under the very touch of the vendee.
 REYNOLDS.

Lord ELLENBOROUGH C. J. Yes, but here is the further fact that the acceptance of *Cowper and Co.* for the amount had been transmitted to the vendors. Unless you shew that the bill was dishonoured, they stood in the situation of paid sellers ; if *Cowper and Co.* had not then the property in the goods, the consequence would have been that the property would have remained in abeyance till the time of payment of the bill had run out.

Verdict for the plaintiff.

Park for the plaintiff.

Bolland for the defendant.

[Attornies, *Isaacs* and *Jones*.]

(a) Cited 3 Term Rep. 467.

Thursday,
 December 14.

PHIPSON v. KNELLER.

The drawer
 of a bill of ex-
 change, who
 before the

ASSUMPSIT by the indorsee of a bill of exchange
 against the drawer.

bill becomes due, says my residence is immaterial, I will inquire whether the bill is paid, dispenses with notice of the dishonour.

10

Three

Three days before the bill become due, *Kneller* the drawer upon inquiry made by the holder told him, that the bill when due would not be paid by the acceptor; and said he would not give his own address, but would call in a few days and inquire whether the bill had been paid or not.

1815.

PHIPSON
v.
KNELLER.

LORD ELLENBOROUGH. — No legal proposition can be more clear than that where a party says, my residence is immaterial, I will inquire whether the bill is paid, he thereby takes upon himself the *onus* of making inquiry and dispenses with notice.

Verdict for the plaintiff.

Garrow A. G. and *Dehany* for the plaintiff.

Marryatt for the defendant.

[Attornies, *Willoughby* and *Fotbergill*.]

ALLDRED v. HALLIWELL.

Same day.

DEBT to recover a penalty of 50*l.* under the *st.* 47 *G.* 3. *sess.* 2. *c.* 68. *s.* 24. for having delivered a ticket to the clerk of the market before the arrival of a coal vessel.

In an action for a penalty against the master of a coal vessel, for the delivery of a ticket before

the arrival of the vessel, the copy of the certificate delivered to the clerk of the market, describing the defendant as master of the vessel is not sufficient evidence to prove a sending by the defendant.

But (*semble*) a sending by him would be presumed on further proof, that he was master of the vessel.

After the plaintiff's case has been closed, the Court will not allow him to remedy a defect in his evidence, unless it has occurred from inadvertency on the part of his counsel.

1815.
ALLDRED
v.
HALLIWELL.

It appeared that the *Brompton* had arrived at *Blackwall* on the 30th *November*, and in the *Pool* *December* 1st; and that a copy of the certificate of the fitter of the coals had been delivered to the clerk of the coal market on the 30th of *November*.

In this document *Halliwell* the defendant was described as the master of the *Brompton*.

After the plaintiff's case had been closed — *Gurney* for the defendant objected, that this was insufficient to charge the defendant as the master.

The *Attorney-General* contended, that this document which had been delivered under the statute, was evidence to prove a sending by *Halliwell*, and that if it were not, the statute would be in effect repealed, since it would be impossible to prove a personal sending by the master.

LORD ELLENBOROUGH. — Prove him to be the captain of the *Brompton*, and then it will be presumable that he sent it, the statute is defective in not providing that the certificate shall be evidence.

The *Attorney-General* then offered to prove that the defendant was captain of the vessel.

Gurney. This is too late after the plaintiff's case has been closed.

Lord ELLENBOROUGH.—If the omission occurred from inadvertence on the part of the plaintiff's counsel, I will hear the witness, but not otherwise.

1815.
ALLDRED
v.
HALLIWELL.

The *Attorney-General* admitting that the witness was not named in his brief, and that there had been no intention to call him originally; the plaintiff was nonsuited.

Garrow A. G. and *Adolphus* for the plaintiff.

Gurney for the defendant.

[Attornies, *Wyatt* and *Clement*.]

HUGHES v. KING.

DEBT on bond. The condition recited, that the defendant had sold a term of 21 years in the *Star and Garter* public-house for 1000*l.*, and contained (*inter alia*) a stipulation on the part of the defendant, not to convert the *King's Arms* public-house which belonged to him into a wine vaults, under a penalty of 500*l.*

A bond given for the purpose of securing certain conditions to be performed by the vendor of a house, requires a 2*s.* stamp only, and not an *ad valorem* stamp.

1815.

HUGHES

v.

KING.

Pleas: 1. *Non est factum*; 2. That the defendant had not converted the *King's Arms* into a wine vaults.

The bond was stamped with a 20s. stamp.

Jervis objected that under the stat. 48 G. 3. c. 149. schedule, tit. *Bond*, a 2*l*. stamp was necessary, since it was either a bond for the payment of the penalty, or for the repayment of part of the sum advanced.

LORD ELLENBOROUGH held, that the bond in question, was not within either of the descriptions alluded to. It could not be termed a security for a definite sum, when it was a penalty, which might cover a number of breaches, and where the sum itself was payable only upon a contingent event; neither was it for the repayment of a definite sum.

Verdict for the plaintiff.

Garraw A. G., Abbott, and Comyns for the plaintiff.

Jervis for the defendant.

[Attornies, *Wilks* and *Williams*.]

WATSON, and his Wife, Administratrix of **MAXWELL v. KING.**

1815.

TROVER for three-fourths of the vessel *Little William*.

Maxwell, the owner of three-fourths of this vessel, sailed in the ship *Effort* for *Bermudas*, in *May* '1813, having first empowered *Ward*, the owner of the *Effort*, by a power of attorney to sell his interest in the *Little William*. *Maxwell* sailed from *Jamaica* in the spring of 1814, with many more merchant ships, under convoy for *England*. From the 1st of *March* 1814, to the 9th, the convoy met with strong gales and tempestuous weather, and on the night of the 9th, the *Effort* parted from the rest of the convoy in thick weather, and had not since been heard of. There was another heavy gale on the 20th of *March*. One of the vessels sailing with the same convoy did not arrive in *England* till the middle of *August*. Upon the 8th of *June* in the same year, *Ward*, under the authority of the power of attorney, sold *Maxwell's* interest in the *Little William* to the defendant.

Where a vessel is proved to have sailed, and has not been heard of for two or three years, it is to be presumed, that she is lost, but at what time an individual who sailed on board of such vessel perished, is to be collected by the jury from the particular circumstances of the case. A power of attorney authorizing the sale of a vessel, is revoked by the death of the owner. The plaintiff may recover for a fractional part of a ship, in an action of trover.

Topping for the defendant, insisted that it was incumbent on the plaintiffs to prove the letters of administration, and that they could not recover

1815.

WATSON

v.

KING.

cover a fractional part of the vessel in an action of trover.

But Lord ELLENBOROUGH over-ruled both the objections, observing as to the first, that a *profert* had been made of the letters of administration, (which were in Court,) and on the second referring to the case of *Addison v. Overend*. (a)

Topping then contended, that the death of *Maxwell* had not been sufficiently proved, and that even supposing him to have died before the 8th of *June*, the death did not revoke the power of attorney.

Lord ELLENBOROUGH, referring to the case of *Paterson v. Black* (b), observed that this was the kind of proof of loss usually given in actions against insurers, where the vessel is proved to have sailed, and has not been heard of for two or three years. His Lordship afterwards informed the jury, that it might be assumed, that at that time, *Maxwell* was dead; but that it was for their consideration, whether he was dead on the 8th of *June* 1814, when the sale was effected by *Ward*; that if they were of opinion that *Maxwell* died before that day, then the power of attorney had been revoked by the death, and they ought to find for the plaintiff, otherwise for the defendant.

Verdict for the plaintiff.

(a) 6 T. R. 766.

(b) *Marshall on Insurance*, 781.

AFTER MICHAELMAS TERM, 56 GEORGE III.

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Garrow A. G. and *Campbell* for the plaintiff.

1815.

Topping and *Taddy* for the defendant.

WATSON
v.
Kna.

The Court of K. B. in the ensuing term refused
a rule nisi for a new trial.

[Attornies, *Kearsey & Co.* and *Tomlinsons.*]

HERVEY and Others, Assignees v. LIDDIARD.

ASSUMPSIT by the assignees of *M. B. Hervey*
and *J. W. Hervey*, bankrupts, to recover the
sum of 339*l.* which had been received by the de-
fendant under the following circumstances.

M. B. Hervey and *J. W. Hervey* were bankers,
at *Rochford*, and also at *Billericay*, in *Essex*. *J.*
W. H. had opened a linen-draper's shop in *Lon-*
don, and had become indebted in a larger amount
than the sum in dispute to the defendant *Liddiard*,
a linen-draper in *London*. In part payment of this
debt, *J. W. H.* drew a bill on *Jemmett and Co.*
bankers, in *Kent*, and through the medium of one
Wade, procured the bill to be discounted, and
Wade agreed to send the amount to the *George*
Inn, in the *Borough*, for the use of *J. W. Hervey*.

A. shortly be-
fore his bank-
ruptcy draws
a bill, and
having pro-
cured it to be
discounted,
gives *B.* a cre-
ditor an order
to receive the
amount which
he directs *C.*
who discounts
the bill to
transmit to *B.*;
whilst the
money is in
the hands of
the carrier,
A. commits
an act of
bankruptcy,
B. who after-
wards receives
the money, is
liable to *A.*'s
assignees.

The

1815.

HERVEY

v.

LIDDIARD.

The bill was discounted on the 16th of *May*; on the 17th, *J. W. Hervey* committed an act of bankruptcy, and left the kingdom, having first given to *Liddiard* an order to receive the money. The money arrived in *London* on the 18th, and on the 19th it was received by *Liddiard's* porter. On the 8th of *July* a joint commission issued against *M. B. Hervey* and *J. W. Hervey*, by virtue of which the plaintiffs claimed.

Park for the defendant contended, that since the order for the receipt of the money had been given by *J. W. Hervey* to *Liddiard* several days before his bankruptcy, he was virtually in possession of the money before the bankruptcy, although it was not in fact received till the 19th.

But Lord ELLENBOROUGH was of opinion that whilst the money remained in the hands of the carrier, the property remained unaltered. If before the delivery, the notes had been lost, the loss must have fallen upon *J. W. Hervey*, and not upon the defendant, consequently the property passed to the assignees.

Verdict for the plaintiff.

Garrow A. G. and *F. Pollock* for the plaintiff.

Park for the defendant.

[Attornies, *Tilson & Co.* and *Wright.*]

SPLITGERBER *v.* KOHN.

1816.

Friday,
December 15.

ASSUMPSIT by the indorsee of a promissory note against the maker.

The note was made in *Prussia*, payable seven days after sight.

Garrow A. G. objected that in the margin of the note the words were added "accepted on myself payable every where," and that this, which was material since it altered the nature of the note, ought to have been declared on. But

Lord ELLENBOROUGH held, that these words constituted no part of the original instrument, their effect was merely to supply an acknowledgment of the sight of the bill, and that although the entry was in fact contemporaneous with the note itself, in point of law its effect was subsequent.

Verdict for the plaintiff.

Park and *Topping* for the plaintiff.

Garrow A. G. and *Heath* for the defendant.

[Attornies, *Deane* and *Warne*.]

The maker of a promissory note, payable at a specified time after sight, at the time of making it writes in the margin, "accepted by myself," these words constitute no part of the original instrument, and need not be noticed in the declaration.

1815.

FENTON v. HOLLOWAY.

In an action for work and labour, proof that the plaintiff was in a state of intoxication when he signed that which is insisted on by the defendant as an agreement, dispenses with the necessity of producing it.

ASSUMPSIT for work and labour.

The plaintiff proved work to have been done by him for the defendant, but it appeared that an agreement in writing had been entered into between the parties relating to this work.

Garrow A. G. for the defendant objected that the agreement ought to be produced. But the same witness who stated the existence of the agreement, stated also that *Fenton* when it was executed was in a state of intoxication, and that the defendant had afterwards refused to produce it upon the plaintiff's request.

Lord ELLENBOROUGH then ruled, that the instrument was to be considered as a nullity, and that it was unnecessary to produce it.

The validity of the contract was afterwards established on the part of the defendant, and having paid money into court, to the amount agreed upon, he had.

A verdict.

Park for the plaintiff.

Garrow A. G. for the defendant.

[Attornies, *Debarry* and *Sheppard*.]

ELTON v. JORDAN.

1815.

ACTION on a warranty of a horse.

The evidence of the plaintiff's and defendant's witnesses was very contradictory; but one of the witnesses for the defendant admitted that he had bandaged one of the fore legs of the horse, but not the other, because the one was weaker than the other. The horse had been warranted sound.

An infirmity which renders a horse less fit for present use and convenience, is an unsoundness; it is not essential that the infirmity should be of a permanent nature.

LORD ELLENBOROUGH. — To constitute unsoundness, it is not essential that the infirmity should be of a permanent nature; it is sufficient if it render the animal for the time unfit for service, as for instance, a cough, which for the present renders it less useful, and may ultimately prove fatal. Any infirmity which renders a horse less fit for present use and convenience, is an unsoundness.

The jury found accordingly.

Garrow A. G. and Marryatt for the plaintiff.

Topping and Scarlett for the defendant.

[Attornies, *Smith and Wilkinen.*]

1815.

DICKENSON v. LILWAL and Others.

By the custom of the Irish provision trade, the authority of the broker to sell the goods of his principal, (in the absence of special authority to the contrary) expires with the day on which it is given.

Qu. whether the bought and sold notes made by a broker are not sufficient to satisfy the statute of frauds, although he makes no entry in his book.

ASSUMPSIT on an alleged breach of a contract, to deliver goods bargained and sold.

The defendants, on the 30th of *June*, had authorized *Grainger*, their broker, to sell for them a quantity of *Irish* butter, which they expected from *Ireland*. On the 6th of *July*, *Grainger*, without any intermediate communication with his principals, sold to the plaintiff 250 firkins of butter, at the rate specified by his employers. He made no entry of the sale in his own book, but shortly afterwards made a note in the following terms, which he took to the defendants :

“ Sold for *Lilwal and Co.* to — *Dickenson*,
 “ 250 firkins of *Hunt’s Waterford* butter, at 100s.
 “ for the best quality, and the usual difference for
 “ inferior quality ; shipped in the month of *July*,
 “ and payable by bill at two months, &c.”

Lilwal and Co. dissented from the contract, on the ground that their agent was not authorized to make it without a more recent order, and *Grainger* tore the note, and upon the trial gave parol evidence of the contents.

Park

Park for the defendants contended, that in order to satisfy the statute of frauds, it was necessary that the broker should make an entry of the contract in his own books, and that a sold note was not sufficient, and cited *Hinde v. Whitehouse*. (a)

1815.
 DICKENSON
 v.
 LILWAL
 and Others.

Garrow A. G. for the plaintiff. — If it had been held that the broker was bound to make an entry in his own book in the first instance, it might have been a rule of great convenience, but this is not necessary; the broker has made a complete record of the contract, by making a complete *sold note*, and the defendants having, by their conduct, prevented the execution of the contract, it was nugatory to multiply copies.

LORD ELLENBOROUGH. — In the case of *Hinde v. Whitehouse*, the entry in the book was considered as the contract, and the bought and sold notes were merely evidence of it. That case does not go the length of deciding, that where no entry is made in the broker's book, the bought and sold notes may not be sufficient to satisfy the statute. I do not know that the question in the present form has been brought before the consideration of the court, and therefore I will reserve the point. Any memorandum of the contract is sufficient to save the statute of frauds, although each party may not have the producible benefit of it.

(a) 7 East, 558.

1815.

DICKENSON

v.

LILWAL
and Others.

The defendant afterwards proved, by the concurrent testimony of a great number of Irish provision merchants and brokers, that according to the established practice and usage of the trade, the authority of the broker (as between himself and his principal) to sell, expires with the day on which the authority is given, unless it be extended by some special authority to a future day, and that it had been the usual course for the broker to apply for a renewed authority from his principal every morning.

The custom having been fully established, the counsel for the plaintiff elected to be nonsuited.

The Attorney-General & Campbell for the plaintiff.

Park for the defendant.

[*Attornies, Osbaldeston and Clutton.*]

Tuesday,
December 19.

MACDOUGLE v. The ROYAL EXCHANGE ASSURANCE
COMPANY.

To constitute
a stranding, it
is essential

that the
vessel should
be stationary,
the striking on

a rock where the vessel remains for a minute and a half only, is not a stranding, though she thereby receives an injury, which eventually proves fatal.

ASSUMPSIT on a policy of assurance, the loss
alleged by stranding.

Soon after the vessel had sailed from *New Grimsby*,
she struck upon a sunken rock, and lay there upon

her

her beam ends for a minute and a half, when she was released and proceeded on her voyage. The plaintiff was about to shew that in consequence of this accident the cargo was ultimately lost.

1815.

M^cDOUGALL
•
The ROYAL
EXCHANGE
ASSURANCE
COMPANY.

LORD ELLENBOROUGH. — Before you enquire into the effect, you must establish the cause as stated in the declaration, that is a stranding. A striking is not sufficient, it is merely temporary, or as it has been vulgarly described, a touch and go; but in order to constitute a stranding, the ship must be stationary.

The jury, which was a special one, declared, that they entertained no doubt upon the subject, and the defendant had

A verdict.

Scarlett and Heath for the plaintiff.

Garrow A. G. for the defendant.

The *Court of King's Bench*, in the ensuing term, refused to grant a rule *nisi*, for a new trial.

[Attornies, *Burn and Kaye & Co.*]

1815.

REED and Another v. JAMES.

Q^u. Whether in an action by the assignees of a bankrupt, the petitioning creditor is compellable in a court of law to produce the bill of exchange drawn and indorsed by the bankrupt, on which the petitioning creditor's debt is founded.

A petitioning creditor called for the mere purpose of producing such a document, cannot, although he has been sworn, be cross-examined by the defendant.

TROVER by the plaintiffs as assignees of *Baker* and *Cawthorne* bankrupts.

The action was brought to recover the value of a quantity of utensils, used in the brewery of the bankrupts.

Notice having been given to prove all the ingredients of bankruptcy. *Tinson*, the petitioning creditor was called and sworn, and was then called upon to produce the bill of exchange drawn and indorsed by the bankrupts, which constituted the petitioning creditor's debt.

Tinson protesting against the production of the bill addressed the Court, to know whether he was obliged to produce it.

LORD ELLENBOROUGH. — I do not know the relation in which you stand to the parties, but you cannot with propriety withhold the instrument. I cannot however do more than advise you to exercise a sound discretion on the subject, and it will be for the Lord Chancellor afterwards to deal with the case accordingly.

Tinson then produced the bill.

The

The *Attorney-General* contended, that he had a right to cross-examine Mr. *Tinson* for the defendant, since he had been sworn, and some proof had been derived through him in furtherance of the plaintiffs' case.

1815.
 REED
 and Another
 v.
 JAMES.

LORD ELLENBOROUGH.—The plaintiff could not by calling the petitioning creditor make him a witness, and if the defendant had not objected to him, I should not have permitted him to give evidence.

A question afterwards arose as to the validity of the petitioning creditor's debt, which was reserved for the opinion of the Court.

Verdict for the plaintiff.

Park, Espinasse, and Brougham for the plaintiff.

Garrow A. G., Richardson, and Scarlett for the defendant.

[Attornies, *Reed* and *Young*.]

1815.

REED and Another v. JAMES.

The assignees of a bankrupt may recover, as for money had and received against the defendant who took the goods of the bankrupt in execution, (after an act of bankruptcy) and then took the goods under a bill of sale from the sheriff, although no money was actually paid.

A bankrupt in an action by the assignees against a judgment creditor who has taken the goods of the bankrupt in execution, is competent to prove that the creditor knew that the bankrupt was insolvent at the time of the execution.

ASSUMPSIT by and against the same parties to recover money had and received by the defendant to the use of the assignees.

The defendant had on the 9th of *July* 1814, (eight days after the acts of bankruptcy), sued out execution on a warrant of attorney executed by the bankrupts in the preceding *March*. The sheriff took possession of the goods of the bankrupts and executed a bill of sale of them to the defendant for 800*l*. It was objected for the defendant, that the form of action should have been *trover* and not *assumpsit* for money had and received, since no money had in fact been paid into the hands of the defendant, and a case was cited, in which the Court of *King's Bench* had recently decided, that the pecuniary form of action could not be supported by a lodger against the tenant, for permitting the superior landlord to distrain the goods of the lodger.

For the plaintiffs it was answered, that the sheriff had certified on the bill of sale, that he had sold the goods for 800*l*. ; if the sale had been to a stranger, it is clear that this would have been the proper form of action ; and here the transaction is the same in effect, although the defendant did

did not take the money out of his pocket, merely that it might be returned thither by the sheriff.

1815.
 REED
 and Another
 JAMES.

Lord ELLENBOROUGH was of opinion, that the action was maintainable in its present form, although trover might have been preferable. Under the circumstances, the sheriff might have returned *feri feci*. His Lordship added, that he would reserve the point, though he did not think it was attended with much doubt.

One of the bankrupts having been called to prove that the defendant knew their insolvency at the time when the execution was issued,

Garrow A. G. objected, that he was incompetent to prove the fact, since he could not be called either to affirm or dis-affirm his own bankruptcy, and could not be called to defeat a judgment.

But Lord ELLENBOROUGH said, that he was competent to do this in many instances, and that the rule was restricted to evidence, affirming or dis-affirming the bankruptcy.

The *Attorney-General* offered to prove, that the act of bankruptcy, on proof of which the parties had been declared bankrupt, was a concerted act; but the plaintiffs having proved another act of bankruptcy which stood unimpeached;

1815.

REED
and Another

v.

JAMES.

It is competent to the assignees of a bankrupt upon the trial, to repudiate an insufficient act on which the commission is founded, and resort to better.

Lord ELLENBOROUGH was clearly of opinion, that they might repudiate the insufficient acts, and rely upon those which were better.

Park, Espinasse, and Brougham, for the plaintiffs.

Garrow A. G. and Scarlett for the defendant.

In the ensuing term, the court of *K. B.* granted a rule *nisi* for a new trial, on a question arising on the petitioning creditor's debt *only*.

[Attornies, *Reed and Young*.]

Wednesday,
December 20.

BOVILLE and Another v. BRADBURY.

It is to be presumed that a broker who has bought goods for his principal has done every thing requisite, according to the usual course of dealing for the completion of the purchase.

SPECIAL assumpsit against the defendant, who acted as broker to the plaintiffs, (and who had, according to their direction, purchased a large quantity of cotton for them, which lay in the warehouse of the *East India Company*), for not delivering over to the plaintiffs the usual warrants.

Where such goods are in the warehouse of the *East India Company*, according to the usual course of dealing, the *East India Company* deliver a warrant or ticket to the proprietor of such goods, directed to one of the servants of the company, which in substance contains a direction to deliver particular

cular goods to the proprietor, or his assigns, notified by indorsement upon the warrant, and when a sale is made, the usual practice is for the vendor to deliver over the warrant to the vendee.

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 and Another
 v.
 BRADBURY.

The plaintiffs having proved this to be the course of trade, and having also proved that the defendant had acted as broker, and had delivered a bought note for those goods, closed their case.

Lord ELLENBOROUGH held this to be a *prima facie* case; as against the broker it was to be presumed, that he had received the warrants; in saying that he had bought the cottons, he virtually said, I have done all that is necessary to effect a transfer, and since a delivery of the warrants was essential to a purchase, it imported that he had received them.

For the defendant it was proved, that the plaintiffs, after the purchase, had authorized the defendant to dispose of these cottons, and that he had sold them accordingly.

Lord ELLENBOROUGH held that this was an answer to the action.

Plaintiff nonsuited.

The *Attorney-General* and *Campbell* for the plaintiffs.

Topping and *E. Lawes* for the defendant.

[Attornies, *A. Clark* and *Kirkman*.]

1816.

Friday,
Dec. 22.

CULLEN v. BUTLER.

An averment of loss by perils of the seas, is not supported by proof that the vessel was sunk in consequence of being fired upon by another vessel under a mistake.

POLICY of insurance on the ship *Industry* — loss alleged by perils of the seas.

It appeared that the vessel fell in with the *Midas*, which, mistaking her for a privateer, fired a broadside upon her, which sunk her.

To shew that a loss of this nature came within the description alleged, *Richardson* cited the cases of *Pickering v. Barclay*, (a) and *Beaver (b) v. Tomlinson*.

Lord ELLENBOROUGH. — This a loss by perils on the seas, not of the seas. In the cases cited, the sea was immediately conducing to the destruction of the vessel.

Verdict for the plaintiff, subject to a motion.

The declaration was afterwards amended, and a new trial had.

The *Attorney-General* and *Richardson* for the plaintiff.

Park for the defendant.

[*Attornies, Paterson and Blunt & Co.*]

(a) 2 Roll. Abr. 248. *Abbott on Shipping*, 253.

(b) *Abbott on Shipping*, 255.

WILLIAMS and Others v. YOUNGHUSBAND.

1815.

ASSUMPSIT by *Williams*, and the assignees of *Hodgson*, for insurances effected and premiums paid by *Williams* and *Hodgson*, on account of the defendant.

Policies of insurance having been delivered to the assignees of a bankrupt, one of whom is since dead, proof of an application to the solicitor under the commission for such policies who did not know what had become of them, does not warrant the admission of secondary evidence.

It appeared that *Parry*, one of the three assignees under the commission against *Hodgson* was dead, and *Hodgson*, who was called as a witness, stated that the policies in question had been delivered over to the assignees. No application had been made, either to the surviving assignees, or to the executors of the deceased assignee, but only to *Mr. Pearse*, the solicitor under the commission, and the attorney for the defendant, who did not know what had become of the policies in question.

In an action for effecting policies of insurance, it is necessary to prove their existence by producing them.

Lord ELLENBOROUGH was of opinion that this was not such evidence of loss as warranted the admission of secondary evidence.

For the plaintiffs it was then contended, that it was unnecessary to give in evidence either the policies, or to supply their place by secondary evidence, since their contents were not wanted.

Lord ELLENBOROUGH. — But you want to shew the existence of the policies, and this must be proved by their production.

The

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and Others
v.
YOUNGHUS-
BAND.

The plaintiffs not being able either to produce the policies or to prove them lost, so as to entitle them to give secondary evidence, were

Nonsuited.

Park and Marryatt for the plaintiff.

Garrow A. G. and Lawes for the defendant.

[Attornies, *Bleasdale & Co.* and *Pearse & Co.*]

ROWE v. OSBORNE.

A vendee of goods is bound by the contract, as stated in the note signed by him, and delivered by the broker who effected the sale to the vendor, although this note varies from the note delivered by the broker to the vendee.

It is a question for the jury, whether

the vendee of goods which turn out to be of a quality inferior to that which was stipulated for, has in point of fair mercantile dealing given a notice sufficiently early to the vendor of his intention to repudiate the contract.

ASSUMPSIT on a special agreement for the purchase of a quantity of bacon; breach alleged in not accepting bills of exchange in payment, according to the agreement.

The contract was made between the defendant, a trader in *London*, with the plaintiff, a dealer in *Ireland*, through the medium of *Penny*, a broker, who delivered a note to the plaintiff signed by *Osborne* in the following terms:

“ *March 28, 1815.*

“ *Bought of Rowe and Co., through Thomas*

“ *Penny, 100 bales of prime singed bacon, at*

“ 56s. *per* cwt. free on board; weight 24 to 28
 “ *per* 10 bales, to be shipped next month, and
 “ drawn for 60 days, from the date of the bill of
 “ lading; warranted weight upon landing; *defi-*
 “ *ciency, if any, to be settled by Mr Penny.*”

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v.

Osborne.

The *Attorney General* for the defendant, objected that the declaration, which stated the clause as to deficiency as part of the contract, varied from the contract, since the note of the contract sent to the defendant, by which alone, as he contended, the defendant was bound, contained no such stipulation.

But Lord ELLENBOROUGH was of opinion, that the note of the contract given in evidence, and which was signed by the defendant, was evidence against him, that this was the real contract.

The bacon arrived in the port of *London* on the 25th of *May*, and on the 19th of *July*, and upon a subsequent day, many bales were opened, and it appeared that the bacon was not of the quality described; *viz.* prime singed bacon, but ill cured, and that a considerable portion of it was unfit for use; the defendant, however, made no objection on this score, and communicated no information to the plaintiff on the subject till the 27th of *November* following.

Lord ELLENBOROUGH informed the jury, that if they were of opinion that the bacon was not of the quality

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quality contracted for, they were to consider whether in point of fair mercantile dealing, the defendant was not bound to give earlier notice of his objection to the plaintiff, in order that the latter might have taken steps to redeem himself, and whether he was not bound to give immediate information to the seller, as soon as he discovered the defect, or at all events, to repudiate the contract at an earlier period, and that they were to give for their verdict accordingly.

The jury afterwards with the permission of the Court, inquired of the witnesses how much the value of the bacon sent, fell short of the value of such as had been contracted for, and gave a verdict, making an abatement accordingly.

Park, Nolan, and Stephen for the plaintiff.

Garrow A. G. and Gaselee for the defendant.

[Attornies, *Passmore and Gregsons.*]

Assignees of HOLLAND & Assignees of HUMBLE.v.—

1815.

ISSUE out of *Chancery* to try whether *Holland* and *Humble*, at the time of their bankruptcy, had any *lien* on the proceeds of the cargo of the ship *Elegante*. *Holland* and *Humble* were in partnership at *Liverpool*, and *Holland* and *Holmes* were in partnership at *Messina*. On the 23d of *August*, 1810, *Holland* and *Holmes* being indebted to the *Liverpool* firm, in a sum exceeding 6000*l.* consigned the cargo of the *Elegante* to *Waring and Co.* at *Liverpool*, desiring them to account to the *Liverpool* house for 3000*l.* part of the cargo, by allowing them to draw bills.

In an issue out of *chancery* to try a question of *lien*, the term is to be understood in its legal sense, which imports an authority either to possess or to retain.

An order by A. to B., directing the latter to pay over to C. a creditor of A.'s, the proceeds of a cargo consigned by A. to B., creates no *lien* in favour of C.

This, it was contended by the plaintiffs' counsel, created a *lien*, and then the only question was, whether this had been defeated by a subsequent countermand given by *Holmes* alone.

LORD ELLENBOROUGH. — Before you inquire whether a *lien* has been divested, you must shew that it once existed. This is nothing more than an order to a third person to pay over certain proceeds, but there is no privity on the part of *Holland* and *Humble* to create a *lien* in the legal sense of the term, though *Waring*, in omitting to pay over the proceeds would have been guilty of an infraction of the directions sent to him. I am to under-

1815.
 HOLLAND
 v.
 HUMBLE.

stand that the Chancellor means *lien* in its *legal sense*, which imports an authority either to possess or to retain, but here the parties, who were not privy to the contract, had no authority to lay their hands upon the cargo.

Plaintiffs nonsuited.

The *Attorney-General*, *Scarlett*, and *Gaselee* for the plaintiffs.

Park for the defendant.

WINDHAM and Another, Assignees of Sir WILLIAM
 FLETCHER v. PATERSON.

It is no objection to the petitioning creditors' debt, that the petitioning creditors were in partnership with the bankrupt in a particular transaction, provided the debt does not arise out of that transaction.

ACTION by the assignees of Sir *W. Fletcher* a bankrupt, to recover the sums of 200*l.* and 400*l.* which had been paid over by the defendant out the funds of the bankrupt, to two of his creditors after the act of bankruptcy.

On proving the petitioning creditor's debt, it appeared that *Todhunter and Co.* the petitioning creditors, had all been in co-partnership with *Fletcher*, in a contract to supply provisions for the use of the navy.

Garrow

Garrow A. G. for the defendant, objected, that 1815.
 where all the parties constituting a particular firm, WINDHAM
 are also in co-partnership with the bankrupt, they and Another
 cannot be petitioning creditors until their affairs v.
 have been brought to a settled account. PATERSON.

LORD ELLENBOROUGH. — If the debt arise out of the transaction, which is the subject of the partnership with the bankrupt, they cannot, but if the debt does not arise out of the partnership concerns, they may.

It appeared that *Todhunter and Co.* had dealt largely with Sir *W. F.* in concerns in which they were not co-partners, and that Sir *W. Fletcher* was indebted, upon a balance to *Todhunter and Co.* in a very large amount.

Objected that this was not evidence of a debt, without shewing the assent of Sir *W. F.*

The plaintiffs then proved that a statement had been sent to Sir *W. F.* making him debtor to *Todhunter and Co.* to a very large amount, to which no objection was made.

LORD ELLENBOROUGH held this to be *prima facie* evidence of the debt.

In order to establish the act of bankruptcy, the plaintiffs in the first instance relied upon the A trader who leaves England and proceeds to Ireland, (where he also carries on trade,) with an honest intention, compatible with trade, does not thereby commit an act of bankruptcy, although he never returns, and although he leaves no funds in England for the payment of his debts.

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L

fact,

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fact, that Sir *W. F.* had departed from *England*, and passed over to *Ireland*, (where he also carried on trade) without leaving funds behind for the payment of his debts; and they cited the case of *Holroyd v. Whitehead*, (*a*) where it was held, that a trader who left his house on account of family dissensions, and thereby occasioned an actual delay, had committed an act of bankruptcy.

Lord ELLENBOROUGH. — He might be going for the very purpose of procuring funds for the payment of his creditors. If he departed with a *bond fide* intention to return, he committed no act of bankruptcy, although in fact he never did return. No doubt a trader must be presumed to contemplate the consequences of his absence; in the the case before Sir *V. Gibbs* the purpose was entirely aliene from that of trade, but here it is probable that the departure was for the very purpose of trade. A creditor certainly has a right to the person of his debtor, for the purpose of application and importunity; but still if he depart with an honest intention, compatible with business, he does not commit an act of bankruptcy.

If a trader
 leave the
 realm for the
 purposes of

The plaintiffs then proved, that Sir *W. F.* from *Ireland* went to *Paris*, from which place he wrote, trade, but whilst he is absent, announce his intention never to revisit *England*, he commits an act of bankruptcy by absenting himself.

(a) 3 Campb. 530.

announcing his solemn intention never to revisit
England.

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and Another
v.
PATERSON.

Lord ELLENBOROUGH held, that this was an act
of bankruptcy under the words of the statute, " or
otherwise absent himself."

The plaintiffs having established their right to
sue as assignees, it appeared that after the act of
bankruptcy, a suit had been instituted by *Macquoid*
a creditor of Sir *W. Fletcher's* in the mayor's court;
and that the defendant who had funds of the bank-
rupt's in his hands, upon an attachment issuing
against him as garnishee in *November 1814*, paid
to *Macquoid* 400*l.*

A debtor of a
bankrupt is
not warranted
in paying
funds of the
bankrupt's to a
creditor, (who
sues the
bankrupt in
the Mayor's
Court,) upon
an attachment
issued against
him as gar-
nishee.

The *Attorney General* insisted that the defendant
was justified in doing this, and that he was not
bound to wait for the judgment of the Court,
which was given in *January*.

But Lord ELLENBOROUGH was of opinion, that
a mere attachment did not justify the defendant
in paying over the money before judgment had
been obtained, and that he ought to have com-
pelled the plaintiff in that suit to bail the attach-
ment.

Verdict for the plaintiffs.

Park and — for the plaintiffs.

The *Attorney-General*, *Bolland*, and *Reynolds*
for the defendant.

[*Attornies, Parntbeor and Hackett.*]

1815.

The Earl of ROSSLYN v. JODDRELL.

Under a bond conditioned for the due payment to the society of Lincoln's Inn, all such sums as should from time to time become due and payable, according to the *customs* and *orders* of the society; the obligor cannot dispute such payments as were at the time of the execution of the bond, considered as dues to the society.

DEBT by the plaintiff as executor of the Earl of *Rosslyn*, who was the surviving obligee of a bond executed by the defendant upon his call to the bar by the Honourable Society of *Lincoln's-inn*, in the year 1771. The *condition* was, that the defendant should duly pay to the society such sums as should from time to time become due to them, according to the *orders* and *customs* of the said society. Pleas, non est factum; 2. Performance of the condition.

It was proved on the part of the plaintiff, that according to the charges usually made upon the members of the society, a sum much exceeding the penalty of the bond was due, and it appeared that these charges consisted of items for absent commons, vacation commons, preacher's stipend, pensioners' stipend, &c. the last of which supplied a fund for the support of the infirm and superannuated servants of the society.

The defendant had never dined in the inn since his call to the bar.

Scarlett for the defendant, proposed to shew that a large proportion of the members had refused to pay for absent or vacation commons, and since the

the condition of the bond was to pay dues according to the *customs and orders* of the society, unless an express order could be shewn previous to the date of the bond, the defendant was not bound to pay such commons. And supposing such orders to be proved, he further contended, that the defendant would not be bound by them, unless they appeared to be *reasonable*; and he objected to the payment of *vacation commons* since commons were no longer provided in vacation, as they formerly used to be when readings were had in vacation. He also contended, that the charge for *absent commons* was unwarranted and unreasonable.

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LORD ELLENBOROUGH.—I shall not look beyond the authority of 1771, to which the defendant attorned by his execution of the bond; it is sufficient if at that time, these were considered as dues payable to the society. In a case like this, where duties are secured by bond for the support of the society, and to enable them to discharge many necessary and charitable expences, it is impossible to say that such charges are not to be paid, because the precise number of joints have not been served up at table.

If such a society abuses its authority and exacts sums to which it is not entitled, let application be made to the proper court, and a criminal information will be granted. But every society which exists would be torn up by the very roots, if objections like these could be tolerated.

It

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It appeared that the society had long before the date of the bond made orders for the payment of absent commons, and it also appearing that these items were such as had been usually charged at the time the bond was executed,

The plaintiff had a verdict for the penalty of the bond.

The *Attorney-General*, *Park*, *Abbot*, and *N. G. Clarke* for the plaintiff.

Scarlett for the defendant.

[*Attornies, Jones and Stevenson.*]

The Assignees of JAMIESON v. HODSON.

A. whilst he is solvent and resident at *Calcutta*, directs B. at *Bombay* to remit certain proceeds to C. in *England* who is in the habit of accepting bills for A., this order is executed by B. without fraud, but after an act of bankruptcy committed by A.; C. has a *lien* on the sum received for his balance.

ACTION for money had and received to the use of the plaintiffs, as the assignees of *Jamieson* a bankrupt.

Jamieson on leaving *England* for the *East Indies* executed a power of attorney, empowering *Hodson* to act for him, and afterwards was in the habit of drawing bills, which were accepted by *Hodson*.

Jamieson

Jamieson from *Calcutta*, and whilst solvent, consigned a cargo of saffron to *Forbes and Co.* at *Bombay*, directing them to transmit the proceeds to *Hodson* in *London*.

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Upon the 29th of *August* 1812, *Jamieson* became a bankrupt, and on the 20th of *September* 1812, *Forbes and Co.* having sold the saffron, remitted to *Hodson*, who was then a bankrupt, a draft for the amount.

The question was, whether *Hodson*, (who defended for his assignees), was entitled to retain this money, the plaintiffs contending that the bankruptcy of *Jamieson* was, in point of law, a countermand of the authority given to *Jamieson*, and consequently, that *Hodson* had no lien on the draft remitted.

But Lord ELLENBOROUGH was of opinion, that since this remittance had been made, in pursuance of an order given by *Jamieson*, whilst he was solvent, and competent to give such an order, and since the order had been executed without fraud, the defendant, who had been in the habit of paying bills for *Jamieson*, had a lien on the remittance, and was entitled to retain the amount.

Verdict for the plaintiffs.

Scarlett and *Marryatt* for the plaintiffs.

Taddy for the defendant.

[Attornies, *Howell* and *Cooper* & Co.]

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CASES

ARGUED AND DECIDED

AT

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IN K. B.

At the First Sitzings in Hilary Term,

56 GEORGE III.

SITTINGS AT GUILDHALL.

PLOMER and Others *v.* LONG.

1816.

January 29.

THIS was an action of debt on a bond, dated 7th *May* 1811, and conditioned for the payment of 1700*l.* within one year. Pleas *non est factum*, and payment.

A payment by the obligor of a bond to the obligee to whom the obligor is also otherwise indebted cannot without some circumstances to shew that it was intended to be made in discharge of the bond, be so applied in favour of the surety of the obligor in an action upon the

This was a bond executed by General *Lee*, and Mr. *Long* as his surety, to secure to *Plomer and Co.* who were the agents of General *Lee*, the sum of 1700*l.* which was due to them at the date of the bond. Mr. *Long* died in the year 1812, and General *Lee* in August 1815, when the present action was commenced against Mrs. *Long*, the executrix of the former.

bond under the plea of payment.

Topping

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LONG.

Topping for the defendant, proposed to shew that since the date of the bond, payments had been made by General *Lee* to the plaintiffs, exceeding the amount of the bond, and that though the general rule was, that the party receiving money has a right to make the application of it, in default of any direction to the contrary by the person paying it; yet in *Newmarch v. Clay*, 14 *East*, 239. it is said, that a special application might arise out of the circumstances of the case, and, in a case like the present, he contended that such payments ought to be considered as made in ease of the surety, who had no power to direct the application.

Lord ELLENBOROUGH. — The plea is payment, and the question is, whether the payment was made *animo solvendi*. The general rule is, that where nothing is directed as to the application, the person who receives it may apply it, in a court of law this cannot be considered as a payment in discharge of the bond, without some circumstances to shew that it was so intended. (a)

Verdict for the plaintiff.

Jervis and Peake for the plaintiff.

Topping for the defendant.

[Attornies, *Pitcher* and *Clayton*.]

(a) See the case of *Newmarch Rawlings*, 1 *Str.* 24. *Goddard v. and Another v. Clay* and Others, *Cox*, *Str.* 1194: Where *A.* owed 14 *East*, 239. *Hawksbaw v.* a debt as executrix and then contracted

tracted a further debt on her own account, and married *B.* who contracted a debt with the same creditor, and then made several payments. On an action against *B.* alone, the question arose how these payments were to be applied in the absence of any express direction by *B.*, and it was held that *B.* being equally liable for the debt of his wife before coverture, and for his own debt during the coverture, the plaintiff might apply the money in discharge of the wife's debt, but that since the demand against *A.* as executrix, depended on the question of assets and on the manner of administering them, the plaintiff could not apply any part of the receipts to that demand. See also the case of *Bloss v. Cutting*, cited *Str.* 1195. *Buller's N. P.* 174.

Meggott v. Mills, 1 Lord Ray. 286. *Anon. Cro. Eliz.* 68. *Bois v. Cranfield, Style*, 239. *Comb.* 463. 16 *Fin. Ab. M. Hall v. Wood & Ux.* 14 *East*, 243. in the note. *Dowse v. Holdsworth*,

Peake's N. P. C. 64. *Hammersley v. Knowlly*, 2 *Esp. R.* 666.

In the case of *Meggott v. Mills* above cited, Lord Holt expressed an opinion that if *A.* being a trader becomes indebted to *B.* in the sum of 100*l.*, and then he quits his trade, and afterwards becomes indebted to *B.* 100*l.* more, and afterwards *A.* pays to *B.* 100*l.* without expressing on what account, since so much in quantity is paid to *B.* as was due to him from *A.*, when *A.* was capable of being a bankrupt, it would be too rigorous to permit *B.* to sue out a commission of bankrupts for the old debt; but his Lordship added, that on this point he would not give an absolute opinion. See the cases above cited, and *qu.* whether in the case put by Lord Holt an intention on the part of the debtor to apply the payment in the manner most beneficial to himself, is not to be implied from the special circumstances of the case.

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DOE on the Demise of RAIKES and Others v. AN- Same day.
DERSON.

PART of the premises sought to be recovered consisted of two houses which the defendant *Alexander Anderson* and his brother *John Ander-* The premises intended to be conveyed by a deed of mortgage, are described as the defendant's undivided moiety, &c., the deed afterwards professes to convey all the defendant's estate, &c. in the premises. This conveys the moiety only, to which the defendant was entitled in his own right, and not one third part of the same premises in which he was interested as a co-trustee with the lessors of the plaintiff.

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SON,

1816.

DOE on the
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ANDERSON.

son, had purchased, and which had been conveyed to them as tenants in common in fee. *John Anderson* devised his moiety to *Raikes, Wilson*, and the defendant, as trustees for certain purposes specified in his will. The defendant, after the testator's death, being considerably indebted to his estate, executed a deed of mortgage to the other trustees. This deed in the description of the premises intended to be conveyed, specified the defendant's undivided moiety of the houses in question, but the subsequent words purported to convey all the defendant's estate, right, title, claim, demand, &c. in law or equity, of or in the messuages, tenements, and hereditaments, thereby granted or conveyed, or intended to be granted or conveyed. These words it was contended for the lessors of the plaintiff precluded the defendant from insisting that any interest in these houses still remained in him.

Holroyd for the defendant insisted, that the latter words referred to the undivided moiety only, especially as the defendant would have been guilty of a breach of trust in conveying the trust estate.

Lord ELLENBOROUGH being of opinion, that the words intended to be conveyed referred to a moiety only, the plaintiffs had a verdict for five-sixths of the houses in question.

Marryatt and Campbell for the plaintiff.

Holroyd for the defendant.

[Attornies, *Osbaldeston and Weston*.]

1816.

HAGEDORN and Another v. WHITMORE.

February 2.

ACTION on a policy of insurance on linen, on board the ship *Henrich*.

The *Henrich* in 1810 sailed from the *Elbe* for the port of *London*, with the insured goods on board, and on her passage fell in with his Majesty's gun-brig the *Aggressor*. The captain of the *Henrich* mistaking the *Aggressor* for a Frenchman, produced simulated papers, concealing the British licence under which he sailed. The *Aggressor* took the *Henrich* in tow, and the latter in order to keep up was obliged to use an extraordinary press of sail, and, during a gale of wind, and a high sea, shipped a quantity of water, by which the ligens were damaged. The witnesses attributed this consequence to the exertions made in order to keep up with the *Aggressor*. Upon notice given to the defendant, he desired the plaintiffs to do their best under the circumstances; and the plaintiff under the advice of a person of experience sold the whole of the linen, and in this action claimed for a loss of 22 per cent. on the whole amount. Most of the packages of linen had been injured, but many of

A merchant ship (under a mistake,) is taken in tow by a British ship of war, and is thereby exposed to a tempestuous sea, which injures goods on board of her, this is a loss from the perils of the sea; — but *scemle*, since the loss resulted from restraint by a ship of war, it might have been alleged to have been occasioned by capture and detention.

By the terms of the policy the underwriter binds himself to pay average separately, on each particular package of the

goods insured, this stipulation does not preclude the assured from recovering an average loss upon the whole exceeding three per cent. under the usual clause in the policy.

And in such case although several packages remain uninjured, they are to be included in the average.

An insurer who desires the assured to do what he conceives to be the best under the circumstances, is bound by what the latter does in the exercise of a sound discretion.

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the pieces in each particular package remained sound.

Scarlett for the defendant contended, first, that this was not a loss within the terms of the policy, since it was attributed in the protest to the conduct of the captain of the *Aggressor*, who took the *Henrich* in tow; this was *prima facie* a trespass on the part of the captain of the *Aggressor*; and although he under the circumstances might probably have justified, this could make no difference in the case as between the assured and the underwriter, and the loss could not be considered as having been occasioned by the perils of the sea. 2dly, By a clause in this policy, the underwriter had been bound to pay average separately on each particular marked package; and although under the terms of the usual memorandum the underwriter would be bound to pay an average loss sustained by the linen in a mass, if the average exceeded three *per cent.* yet the parties were bound by the special clause which was to be taken for better for worse, and that therefore it was not competent to the plaintiff to sell the whole of the linens sound as well damaged, but that he ought to have sold and claimed for a loss on those packages only which were actually damaged, otherwise it would be in the power of the plaintiff to take advantage of the state of the market; if the market price exceeded the valued price, he would sell the sound, and claim only for the damaged goods; if the market price fell short of the valued price, he would sell the whole, and by that

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means make the underwriter pay the difference between the market price and the valued price on the sound goods. 3dly, Some of the packages contained 124 pieces, of which not more than two were damaged, and the rest sound, and to these the same principle applied; and the plaintiff could not by selling or omitting to sell, as the market price exceeded or fell short of the valued price, affect the defendant with the difference.

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HAGEDORN
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v.
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Lord ELLENBOROUGH.—The defendant having desired the plaintiff to do the best he could under the circumstances, was bound by what the latter did in the exercise of a sound discretion on the subject. I am, however, prepared to give my opinion on the first two points which have been made, and which are the only points in the case. First, then, was this a loss by the perils of the sea? The ship is seized in consequence of a misrepresentation of her documents; the protest states, that the sea ran high, and that the vessel shipped a great deal of water, and therefore the damage was occasioned by the perils of the sea, although the apprehension of seizure and the circumstance of her being towed by the *Aggressor*, laid the vessel open to this peril. The loss might have been alleged to have been occasioned by capture and detention (*a*), since it

(a) If a *British* ship be arrested and seized by the authority of the *British* government from state necessity, this it seems is a detention within the meaning of the policy. See *Marshall* on insurance 3d Ed.

510. *Green v. Jones*, 2 Lord Ray. 840. *Salk*. 244. *Robertson v. Bauer*, 1 T. R. 61. *Emerig.* tom. i. p. 541. and *Falin.* tom. ii. p. 134.

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HAGEDORN
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WHITMORE.

was not occasioned by the act of an individual, but by the captain of one of his Majesty's ships. But the present allegation is sufficient, since by the act of capture the vessel was divested of all self-command and power of protection, and exposed to those perils of the sea which in fact did attach. Then as to the memorandum; since the average loss exceeded three *per cent.* the plaintiff is entitled to recover, unless he is excluded by the subsequent words of the policy; the effect of which is to give the party assured a claim for the damage sustained by each individual package. This clause, it appears to me, was introduced for the benefit of the assured, and does not, as has been argued, oust the plaintiffs' claim to general average; neither does it involve the question as to the rise or fall of the markets. The state of the market is of no further use than to ascertain the amount of the loss.

His Lordship afterwards stated his opinion, that though one or more entire packages were uninjured, they were still to be included in the average.

Verdict for the plaintiff, subject to a reference as to the amount.

The *Attorney-General* and *Taddy* for the plaintiff.

Scarlett for the defendant.

[*Attornies, Kaye & Co. and Allan.*]

SANGSTER v. MAZARREDO and Others.

1816.

Same day.

ASSUMPSIT against *Mazarredo* and three others as the acceptors of several bills of exchange, the three other defendants, who resided in *Spain*, had been outlawed. In order to prove the partnership, the plaintiff gave in evidence, a letter written by *Mazarredo*, which amounted to an admission that he was a partner with the other three defendants.

Assumpsit against four, three of whom have been outlawed; an admission by the fourth, that he was in partnership with the other three is evidence as against that fourth of a joint promise by all the four.

The *Attorney General* for the defendant, submitted, that since every count in the declaration alleged the promise to have been made by the four jointly, it was incumbent to prove the allegations by other evidence than the admission of one partner, which could not bind the rest.

Scarlett for the plaintiff, contended, that as against this defendant the allegation of the joint promise was proved, and that the case was analogous to that of an action against a surviving partner, where his admission was sufficient.

Lord ELLENBOROUGH held, that since in any future action which might be brought by the present defendant against the co-defendants for contribution, the record in the present action would not be sufficient evidence to prove that they were parties to the promise, and that it would be in-

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 and Others.

cumbent on him to prove the fact by ulterior evidence; the evidence now offered was sufficient to prove the allegation in question.

Verdict for the plaintiff.

Scarlett and F. Pollock for the plaintiff.

The *Attorney General* and *Littledale* for the defendants.

[Attornies, *Cooper & Lowe* and *Bower*.]

Saturday,
 February 3.

LYBURN v. WARRINGTON.

A deed by which the plaintiff covenants to give up his trade to the defendant, and to allow him to carry it on in his house for ten years, the defendant paying 1000*l.* for the fixtures, &c. at the time of executing the deed and covenanting to pay

DEBT to recover 500*l.* on the defendant's covenant.

The deed contained mutual covenants, which were in substance, that the plaintiff should relinquish his trade of a butcher in favour of the defendant, who was to be admitted into the house occupied by the plaintiff, and to be allowed to carry on the business there for ten years in the joint names of the plaintiff and himself, and the defendant was to have possession of the whole house, with the exception of one room, and also the fixtures.

1000*l. per annum* for ten years, does not require an *ad valorem* stamp.

An indorsement on a deed after it has been signed by the parties, but written at the same time with the sealing and delivery, is part of the deed.

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tures. For this the defendant paid 1000*l.* upon the execution of the deed, and further covenanted to pay 1000*l.* *per annum* for ten years, by quarterly payments.

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v.
WARRINGTON.

Marryatt, for the defendant, objected that the instrument ought to bear an *ad valorem* stamp, under the st. 48. G. 3. c. 149. which imposes an *ad valorem* duty on every conveyance "upon the sale of any lands, tenements, rents, annuities, or other property, real or personal, heritable or moveable, or of any title, right, interest, or claim, into, out of, or upon any lands, tenements, rents, annuities, or other property," and not a common deed-stamp, for since the possession of the house was given for ten years, and the fixtures were included, the transaction was to be considered as a sale of these interests.

LORD ELLENBOROUGH.—The agreement is, that the defendant shall have these as auxiliary to the carrying on the business, and since there is no mention of any distinct substantive property exclusive of the trade, I cannot think that in fair construction the case falls within the operation of this clause of the Act.

Marryatt then objected, that the breach was assigned on an indorsement upon the deed, by which the annuity was made payable by half yearly payments instead of quarterly payments, as stipulated for in the body of the deed, and that it did not appear that the indorsement was part of the deed.
But

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TON.

But on further examination it appeared that the indorsement had been made before the sealing and delivery, though after the parties had signed their names; and

Lord ELLENBOROUGH held, that this was sufficient, since the whole was one transaction done at the same time.

The *Attorney-General*, *Holroyd*, and *V. Lawes*, for the plaintiff.

Marryatt for the defendant.

[*Attornies, Wiltshire & Co. and Brown.*]

Same day.

WILLIS v. DYSON.

Goods are supplied to *A.* and *B.* (who are partners,) after notice by *A.* that he will not be answerable for any goods subsequently sent, it is incumbent

THIS was an action for goods supplied by the plaintiff, who resided at *Birmingham*, to *Dyson* and *Benson*; the latter had let judgment go by default.

In *January*, 1815, *Dyson* had sent the following circular letter to the plaintiff and others: on the plaintiff, in an action for the amount of such goods, to prove some act of adoption on the part of *A.* or that he has derived benefit from the goods.

If a counsel in opening for the plaintiff, read a letter of the defendant's merely as introductory of the plaintiff's case, the letter is not to be considered as given in evidence by the plaintiff, but must be afterwards proved by the defendant as part of his own case, if he mean to rely upon it; *aliter* if the plaintiff's counsel read it as part of the plaintiff's case.

“ Sir,

" Sir,

" I am sorry that the conduct of my partner
" compels me to send the annexed circular. I re-
" commend it to you to be in possession of my in-
" dividual signature, before you send any more
" goods."

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WILLIS

v.

DYSON.

No actual dissolution of partnership took place till the 9th of *June*, 1815. Part of the goods, on account of which the action was brought, had been supplied in the interval between the receipt of the letter and the time of dissolving the partnership.

Lord ELLENBOROUGH held, that although no dissolution had taken place till a later period, yet that after notice by one partner not to supply any more goods on the partnership account, it would be necessary for the party sending goods after such notice to prove some act of adoption by the partner who gave the notice, or that he had derived some benefit from the goods.

No such evidence being given, his Lordship, after commenting on the terms of the circular letter, left it to the jury to consider, whether it amounted to a notice that he would not be answerable for any goods subsequently sent.

The jury, in their verdict, excluded the goods supplied after the notice (a).

(a) See Lord *Galway v. Matthew and Smithson*, 1 Camp. 403. 20 East, 264.

Scarlett,

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Scarlett, in opening the plaintiff's case, had adverted to the circular letter, as intended to be relied upon by the defendant, but did not give it in evidence.

The *Attorney-General*, after the plaintiff's case had been closed, submitted that he had a right to consider the letter as proved.

Lord ELLENBOROUGH said, that if the learned counsel had propounded the letter as forming a part of the plaintiff's case, he could not afterwards have been allowed to retract. But the letter having been stated, merely for the purpose of introducing evidence in answer to it, his Lordship held, that the proof ought to come from the defendant.

Scarlett and *Littledale*, for the plaintiff.

The *Attorney-General* and *Marryatt* for the defendant.

[Attornies, *Windle* and *Brown*.]

1816.

LIEBMAN and Others v. POOLEY and Others.

February 5.

ASSUMPSIT for commission on the sale of goods and on the money counts.

After having proved notice to the defendants to produce a letter written to them by the plaintiffs, a witness was called to give parol evidence of its contents, who stated that the original had been written not by himself, but by a clerk, who was still in the plaintiffs' service.

Scarlett, for the defendants, objected that the witness ought not to be permitted to swear that the writing produced was a copy of the original letter, since better evidence might be derived from the clerk who wrote the original, and who ought to have been called; — but

After notice to produce a letter written by the plaintiff to the defendant, parol evidence of its contents may be given by any one who recollects the contents, although it is in the plaintiff's power to produce the clerk who wrote the letter.

But in such case the contents cannot be proved by the production of a copy of the original copy.

LORD ELLENBOROUGH was of opinion, that the testimony of this witness was admissible; since it was merely contingent and uncertain whether the clerk who wrote the original would, when called, possess a better recollection on the subject than the witness already produced.

Upon further inquiry, it appeared, that the writing intended to be given in evidence as a copy of the original was in itself a copy of the original copy, which remained in the counting-house of the plaintiffs.

1816.

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and Others

v.

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and Others.

plaintiffs. Upon the objection being taken that at all events the original copy ought to be produced;

Lord ELLENBOROUGH acceded to the objection, observing that the evidence now offered was one step further removed from the original.

The plaintiffs, proving their case by other evidence, obtained

A verdict.

The *Attorney-General* and *Marryatt* for the plaintiffs.

Scarlett and *Starkie* for the defendants.

[Attornies, *Crowder & Co.* and *Milne & Parry.*]

COURT OF COMMON PLEAS.

SITTINGS AT WESTMINSTER.

HORSEFALL *v.* DAVY.

1816.

February 7.

DEBT to recover 40*l.* being double the value of the goods, in the removal of which the defendant was charged to have been fraudulently aiding and assisting, for the purpose of preventing a distress for rent.

Although double the value of goods fraudulently removed to prevent a distress, does not exceed 50*l.*, it is competent to the party injured to proceed either by action or in a summary way before a magistrate.

Best, Serjt. for the defendant, attempted on cross-examination to shew, that the plaintiff had already made his complaint before a magistrate, under the 4th section of the st. 11 *G. 2.* c. 19.; and contended, that the party was bound where the double value did not exceed 50*l.* to proceed in the summary way pointed out in that section, and could not support an action, unless the double value exceeded 50*l.* But

And the fact of his having in the first instance made his complaint before a magistrate, will not preclude him from afterwards maintaining an action.

GIBBS, C. J. was of opinion, that the evidence proposed was inadmissible, and that where the sum sought to be recovered was less than 50*l.* it was discretionary on the part of the landlord to

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proceed

1816. proceed either by complaint before a magistrate,
HORSEFALL or by action.
v. The plaintiff had a verdict.
DAVY.

Lens, Serjt. and *W. H. Maule* for the plaintiff.

Best, Serjt. and *Adolphus* for the defendant.

[Attornies, *Geldart* and *Morley*.]

IN THE KING'S BENCH.

SITTINGS AT WESTMINSTER.

CALLARD v. WHITE.

1816.

February 13.

ASSUMPSIT against the defendant, the keeper of an hotel in *London*, for washing the linen of guests in his house, for which it was contended that he was responsible.

The master of an hotel is not liable to pay for the washing of the linen of the guests at his house.

Lord ELLENBOROUGH inquired, whether, when guests had left such bills unpaid, the defendant had been in the habit of discharging them; if he had, an undertaking to this effect might afterwards be inferred, it might be considered as evidence of an antecedent promise.

The witness stating, that in such cases the bills were not paid at all, the plaintiff was

Nonsuited.

Topping and Lawes for the plaintiff.

The *Attorney-General* for the defendant.

[*Attornies, Willoughby and Brown*]

1816.

Same day.

WESTWOOD *v.* COWNE.

An appraisement of a distress by the person who makes it is irregular.

Under an allegation by way of special damage, that the plaintiff had thereby lost divers lodgers (without naming any,) he cannot prove the loss of a particular lodger.

CASE for a vexatious and irregular distress. One count of the declaration alleged, that the defendant, who had made the distress, had sold the goods before they had been appraised as directed by the st. 2 *W. & M. sess.* 1. c. 5. s. 2.

It appeared, that the goods, previous to the sale, had been appraised by two sworn appraisers, but that the defendant Cowne was one of them.

It was admitted by the defendant's counsel, that such an appraisement was irregular.

The declaration alleged, that the plaintiff, in consequence of the injury, had lost divers lodgers, without naming any; upon his offering to prove that he had in fact lost one lodger,

Lord ELLENBOROUGH rejected the evidence, because the name of the lodger had not been specified, observing, that the number was not so great as to excuse a specific description on the score of inconvenience. (a)

Verdict for the plaintiff, with nominal damages.

(a) See B. N. P. 7. 1 Roll. Ab. note (4) to Lord *Arlington* and 58. *Hartley v. Herring*, 3 T. R. *Merrick*, 2 Saund. 411. 130. and Mr. Serjeant *Williams's*

Jervis and Puller for the plaintiff.

The *Attorney-General* for the defendant.

[*Attornies, Upstone and Lover.*]

1816.

WESTWOOD

v.

COWNE.

FORSDICK v. COLLINS.

Same day.

TROVER for the value of a block of *Portland* stone.

The stone had been placed by the plaintiff on the land adjoining some shells of houses, which he had purchased in *Hunter-street*. The defendant afterwards coming into possession of the land, refused to permit the plaintiff to carry the stone away, and afterwards removed it himself to *Burton Crescent Mews*.

Puller for the defendant, contended, that he had a right to remove it from his own premises. —

One who comes into possession of land, on which he finds a block of stone belonging to another, is not justified in removing it to a distance.

And such removal supercedes the necessity of proving a formal demand in an action of trover.

LORD ELLENBOROUGH. — But he is not justified in removing it to a distance. In an action of trespass at the suit of the owner, he must in his justification have alleged, that he removed it to some adjacent place for the use of the owner; he could not have justified this removal.

1816.

FORSDICK

v.

COLLINS.

Puller insisted, that no sufficient demand had been proved.

LORD ELLENBOROUGH. — A demand is unnecessary where the party has been guilty of a conversion, and he is guilty of a conversion where he oversteps the authority of law; here the defendant overstepped that authority by removing the property to a distance. (*a*)

Verdict for the plaintiff.

Campbell for the plaintiff.

Puller for the defendant.

[Attornies, *Wright* and *Vincent*.]

(*a*) See *Williams v. Shaw*, 2 demand and refusal, see 1 Sid. 164. *Bruen v. Roe*, 6 Mod. 212. 1 Esp. R. 93. The taking and carrying away of another's goods is a conversion, and therefore it is not necessary in such case to prove *Baldwin v. Cole*, Bull. N. P. 44. 2 *Williams's* Saunders. note 47 &

 GUILDHALL.

TAYLOR and Others, Assignees of TANNER v. KIN-
LOCH.

1816.

Wednesday,
February 14.

TROVER by the plaintiffs, as the assignees of *Tanner*, a bankrupt, to recover the value of the sloop *Irvine*.

An act of bankruptcy was proved to have been committed on the 2d or 3d of *December* 1814. In proof of the petitioning creditors' debt, the plaintiffs relied on a promissory note of the bankrupts, for the sum of 103*l.* bearing date the 11th of *November* 1814.

The *Attorney General* for the defendant, objected, that this was not sufficient, without proof that the note actually existed before the bankruptcy, otherwise it might have been since fabricated for the purpose, and he cited the case of *Hervey*, a bankrupt, where he said his Lordship

missible in evidence to prove this. — The mere deposit of the documents relating to a vessel at sea, in the hands of a *bond fide* creditor, will not confer even an equitable lien upon the creditor, against the assignees of the owner under a subsequent commission. — A mere literal deviation from the form of conveyance of a ship prescribed by the act, will not render it void. — It is competent to a defendant to impeach the title of a bankrupt in an action by the assignees although he himself claims title under the bankrupt.

The date upon a promissory note made by a bankrupt, is *prima facie* evidence to shew that the note existed before the act of bankruptcy was committed, so as to establish a petitioning creditor's debt in an action by the assignees. — But no declaration by the bankrupt whether oral or written, subsequent to his bankruptcy, would be ad-

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had

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TAYLOR
v.
KINLOCH.

had decided that such additional proof was necessary, and added, that his Lordship's decision had been acted upon.

Jervis for the plaintiffs, contended, that the date apparent on the instrument itself was *primâ facie* evidence of its reality, and that such evidence as would enable a plaintiff to recover in an action, was sufficient to prove the petitioning creditor's debt.

LORD ELLENBOROUGH.—In an action, the date is not material; but unless I find that this rule has been adopted I will allow the cause to proceed, in order to save expence to the parties.—His Lordship afterwards added, that since the point was of universal consequence, he felt inclined to reserve it.

Topping as *Amicus Curie* mentioned a similar case which had occurred on the Northern Circuit, where Mr. J. *Bayley* received the evidence, but left it as a question for the jury, whether the instrument had really existed before the bankruptcy.

The plaintiffs then offered as confirmatory evidence, a letter of *Tanner's*, dated on the 6th of *December* 1814, and consequently after the bankruptcy, and cited the case of *Brett v. Levett* (a) to shew that such evidence was admissible.

(a) 13 East, 213.

The *Attorney General*. — The declaration of the bankrupt on the subject after his bankruptcy, would not be evidence, and therefore his letter cannot.

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TAYLOR
v.
KINLOCH.

Lord ELLENBOROUGH rejected the evidence of the letter, deeming the note itself to be admissible.

The *Attorney General* for the defendant, then stated, that *Tanner* being indebted to the defendant, upon his acceptance of a bill of exchange, on the 26th of *October* 1814.; and whilst the *Irvine* was at sea, transferred to him all the documents relating to the vessel, thereby giving him all the title in his power.

Lord ELLENBOROUGH.—The deposit of these documents would not give even an equitable lien; and his Lordship referred to *Rowlandson v. Hibbert* and Others (*a*).

The defendant then proposed to shew, that *Tanner*, (who had been proved to be in possession of the vessel,) had no title to it, and that consequently the assignees who claimed under him had none; and cited *Moss v. Mills* (*b*), to shew that in such a case the title of the bankrupt might be impeached.

His Lordship, deeming such evidence admissible, provided they went the length of shewing that

(*a*) 3 T. R. 406. 3 Bro. Ch. Ca. 471. Abbott on Shipping, 58.
(*b*) 6 East, 144.

1816.

TAYLOR

KINLOCH.

Tanner had no title, they objected that the conveyance from *Okell*, a former owner, to *Tanner*, did not pursue the form in the act. The form prescribed by the act running thus: "*that I have this day sold and transferred*" in the first person, but the words of the conveyance were, "*that the within-named — Okell hath, &c.*"

LORD ELLENBOROUGH.—If the act were to be so construed, it would be one of the most intolerable nuisances that ever existed.

On further inquiry, it appeared that the vessel had never been registered in the name of *Tanner*; —but that on the 15th of *January*, 1815, upon a bill of sale executed by the bankrupt to the defendant, the registry of sale to *Okell* had been cancelled, and a new one executed to the defendant.

Jervis insisted, that it did not lie in the mouth of the defendant, who claimed under *Tanner*, to object to his title.

LORD ELLENBOROUGH.—It is for you to make out your case *proprio Marte*. You may apply for redress in a court of equity; but since *Tanner* was never the registered owner of the vessel as the statute requires, I look upon it to be clear that neither he nor his assignees can enforce a legal claim in a court of law.

Plaintiff nonsuited.

Jervis and Espinasse for the plaintiffs.

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The *Attorney-General* and *Puller* for the defendant.TAYLOR
v.
KINLOCH.[Attornies, *Partridge and Crowder & Co.*]

HUGHES v. WILSON.

Same day.

THIS was an action of assumpsit for goods sold and delivered.

In the course of the cause, in order to throw discredit on the plaintiff, by shewing, that he had charged the defendant with a larger sum for shipping-duties than he had actually paid at the custom-house, a clerk belonging to the custom-house was called, who produced the book containing the shipping entries; he stated, that the practice was for the person passing an entry to deliver a shipping note into the office, from which the entries in the book were made, after which the notes were filed; but that the note from which the entry had been made, which related to the goods in question, had been burnt in the conflagration at the custom-house: the entry in the book had been made by himself.

A shipping entry at the custom-house, although to some purposes a public document, is not evidence to affect the person (whose duty it was to cause the entry to be made) criminally, the materials from which the entry was made, by the proper officer, having been accidentally destroyed.

The *Attorney-General*, for the plaintiff, objected, that the entry was not evidence against Hughes, without

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v.
WILSON.

without shewing that he made or presented the note, or, if it was presented by an agent, without calling that agent, particularly, since the evidence was offered to prove fraud on the part of the plaintiff.

Topping submitted, that it was evidence as a public document.

LORD ELLENBOROUGH.—Yes, it might for some purposes, such as to entitle the party to the privilege of sailing, but it would be dangerous to admit such evidence in order to fix a person with the commission of a crime.

The *Attorney-General* and *Gurney* for the plaintiff.

Topping and *Littledale* for the defendant.

[*Attornies, Cuppage and Wilson.*]

See *Johnson v. Ward*, 6 Esp. 47, 8. Where it was held that the custom-house copy of the searcher's report, produced by the officer in whose custody it was lodged, was evidence to prove an actual shipment of the goods specified in it.—But the entry in the register book at the custom-house, of the certificate of the transfer of the vessel

to a particular person, is not even *prima facie* evidence to charge that person as owner, unless the entry be proved to have been made by his authority, *Frazer v. Hopkins* 5 *al.* 2 Taunt. 5. 2 Camp. 170. *Tinkler v. Walpole*, 14 East, 226. *Abbott*, 85. and see also *Weaver v. Prentice* and *Another*, 1 Esp. R. 369.

SITTINGS AT WESTMINSTER.

DOE on the Demise of WAITHMAN and Others
v. MILES.

1816.

Thursday,
February 15.

EJECTMENT to recover a house in *Holborn*, on the joint demise of *Robert Waithman, John Smith, and Thomas Smith*.

The plaintiffs gave in evidence a deed of co-partnership, executed by the defendant and *Wm. Waithman, John Smith, and Thomas Smith*, which recited that the house in question was the property of the lessors of the plaintiff; and that the house should be occupied and used by the partners during the partnership only. It was also proved, that the defendant and his three copartners had signed a notice, which stated, that the partnership *had been dissolved*.

Comyn, for the defendant, contended, 1st. That no tenancy was created by the deed of copartnership; it was therefore to be considered as a common demise by those to whom the house belonged, and therefore notwithstanding a dissolution of the partnership, the usual notice to quit

By the terms of a deed of co-partnership an house is to be used and occupied by the co-partners during the co-partnership. After a dissolution of partnership, no notice to quit is necessary previous to an action of ejectment against a co-partner. Notice by a co-partner that the partnership *has been dissolved*, is evidence as against him, that it has been dissolved by competent means, and therefore is evidence of a dissolution by

deed, if, a deed be essential to such dissolution.

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was necessary. And, 2dly. That there was no proof of a dissolution of the partnership, which, having been created by deed, could not be dissolved by less than a deed.

LORD ELLENBOROUGH.—The house was to be used and occupied by the partners during the partnership only, and when that was determined there was an end of the tenancy. It might be very deserving of attention, whether a partnership created by deed could be dissolved by any thing short of a deed, but here, as against the party who signed the notice, the partnership must be taken to have been dissolved by competent means. If they had stated in the notice "*the partnership is hereby dissolved,*" it might have been different, for the question would then have stood on the effect of that instrument; but as against a person who signed the notice, the partnership is to be considered as having been legitimately dissolved.

Verdict for the plaintiff. (a)

Gurney and Gifford for the plaintiff.

Comyn for the defendant.

[Attornies, *Sweet & Co.* and *Richardson.*]

(a) As to the effect of admissions, see *R. v. Neville*, Peake's N. P. C. 91. *R. v. Gardner*, 3 Camp. 513. *Lipscomb v. Holmes*, 2 Camp. 441. *Chorley v. Bolcott*, 4 T. R. 317. *Barkley v. Stubbs*, 5 T. R. 465. 2 P. W. 434. But an admission by the party will not supply the want of the subscribing witness to a deed. *Abbott v. Plumb*, Doug. 205.

ADAMTHWAITE v. SYNGE.

1816.

Same day.

DEBT on a judgment recovered in the Court of
Exchequer in Ireland.

The witness called to prove an examined copy of the judgment, stated, that at the request of an attorney in *Dublin*, he went to the building where the four Courts are held, and there compared the copy produced with a parchment roll produced by the attorney.

Lord ELLENBOROUGH deeming this evidence insufficient, without either shewing that the original came from the proper place of deposit or out of the hands of the officer in whose custody the records of the *Exchequer* were kept.

Courthope, for the plaintiff, suggested, that from the contents of the copy it would appear, that the original was a record of the *Exchequer*.

Lord ELLENBOROUGH.—It must in the first place be proved by the witness, that the original came out of the proper custody; this cannot be shewn by any light reflected from the record itself, which may have been improperly placed where it was found. Nothing can be borrowed *ex visceribus judicii*, till the original be proved to have come from the proper court.

It

Before a document can be read as a record, it must be proved either that it came out of the hands of the officer of the court, or from the proper place of depositing the records of the court of which it professes to be a record, and the contents of the document itself cannot be called in aid in support of such proof.

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ADAMTH-
WAITE
v.
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It then appeared, that the records of the different courts in *Dublin* were all kept in one room, but in different presses.

LORD ELLENBOROUGH.—Since the records are kept in different presses, the same difficulty still presents itself; it is very distressing to strain the rules of law, when evidence might so easily have been procured. If the witness had stated, that the record came out of the hands of the proper officer, it would have been sufficient. The evidence must be launched by proving that the document came either from the proper person or proper place; till then I cannot look upon it as a record. To admit this evidence would afford a precedent for laxity of proof in other cases.

Plaintiff nonsuited.

Courthope for the plaintiff.

Heath for the defendant.

[Attornies, *Mason and Harrison.*]

See *Collinson v. Hilear*, 3 Campb. 30.

1816.

INGRAM v. SHIRLEY and Another.

ASSUMPSIT. The plaintiff proved, that there had been mutual accounts between the parties, and that a balance had been struck of 25*l.* in favour of the plaintiff

Upon an agreement between two traders to supply each other, on the footing of goods for goods, after a balance struck between them, such balance is to be paid in money.

The defendants contended, that there was an agreement between the parties of goods for goods, according to which they were to supply each other mutually with the goods in which each dealt, and that upon the account taken the plaintiff was not entitled to receive 25*l.* in money, but only goods to that amount from the defendant's warehouse. There was no evidence of an agreement at the time of the settlement, that the balance should be taken in goods.

Lord ELLENBOROUGH was of opinion, that upon a balance struck, the amount of the balance was due in money, otherwise there could be no end to the dealings.

Topping and Storks for the plaintiff.

The *Attorney-General* and *Reader* for the defendants.

[*Attornies, Dolman and Patterson.*]

1816.

Same day.

LEESON v. HOLT and Others.

In an action against a carrier for negligence, the defendant cannot read in evidence, an advertisement in a newspaper, by which he limits his responsibility, unless he first prove that the plaintiff was in the habit of reading that paper. — But (*semble*) an advertisement in the *Gazette* may be read without such preparatory proof, but without it, the evidence is weak.

THIS was an action against the defendants as common carriers, for negligence.

The plaintiff, who resided at *Nottingham*, ordered a number of chairs to be sent by *Davis* from *London*. *Davis* accordingly sent the chairs, and he stated upon the trial, that he went to the defendants' office in *London*, and that he had not seen any notice on the part of the defendants, intimating that they would not be responsible for any damage which might be sustained by furniture, &c.

The defendants relied on a notice painted upon canvas in large letters, intimating that all packages of looking-glass, plate-glass, household furniture, toys, &c. were to be entirely at the risk of the owners as to damage, breakage, &c. This notice was placed in a conspicuous situation over the door of the office; they also proposed to prove, that a similar notice had been inserted in the *Gazette*, and in the *Times* newspaper.

LORD ELLENBOROUGH said, that he would receive evidence of the advertisement in the *Gazette*, but that unless it were proved that the party was in the habit of reading the *Gazette*, the evidence would be of little avail. And his Lordship was of opinion, that

that the advertisement in the *Times* was not admissible at all without proof that it was taken in by the party. The first instance in which such evidence was received, was a case where a person to entitle himself to a more extended lien than the common law allowed, inserted a notice in a provincial *Sunday* paper, and the Court held that it was admissible in evidence, because it was probable that the party had seen it since he took in the paper and the advertisement related to his business.

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LEESON

v.

HOLT
and Others.

It appeared, that *Davis* had occasionally read the *Times* newspaper, and Lord *Ellenborough* then admitted the advertisement contained in it to be read.

In summing up to the jury, his Lordship said,

If this action had been brought twenty years ago, the defendant would have been liable, since by the common law a carrier is liable in all cases except two, where the loss is occasioned by the act of God, or of the King's enemies using an overwhelming force, which persons with ordinary means of resistance cannot guard against.—It was found, that the common law imposed upon carriers a liability of ruinous extent, and in consequence qualifications and limitations of that liability have been introduced from time to time, till, as in the present case, they seem to have excluded all responsibility whatsoever, so that under the terms of the present notice if a servant of the carrier's had in the most

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wilful and wanton manner destroyed the furniture entrusted to them, the principals would not have been liable. If the parties in the present case have so contracted, the plaintiff must abide by the agreement, and he must be taken to have so contracted if he chuses to send his goods to be carried after notice of the conditions. The question then is, whether there was a special contract. If the carriers notified their terms to the person bringing the goods by an advertisement, which, in all probability, must have attracted the attention of the person who brought the goods, they were delivered upon those terms; but the question in these cases always is, whether the delivery was upon a special contract.

Verdict for the plaintiff.

The *Attorney General* and *Marryatt* for the plaintiff.

Scarlett and *Comyn* for the defendants.

[*Attornies, Stevenson and Payne.*]

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WELD v. THE GAS-LIGHT COMPANY.

Same day.

THE defendants, for the purpose of laying their pipes for conducting the gas, had made an excavation in the *Strand* of considerable length, and four feet in breadth. The rubbish which had been raised formed a mound on the side of the excavation, and between the mound and the opposite side of the street there was room for two carriages to pass. Between six and seven o'clock in the evening, in the month of *January*, the plaintiff was driving his gig through the *Strand*, and in avoiding a cart the gig was precipitated into the trench, and the horse which drew it afterwards died in consequence of the injury it received by the fall.

A company which has been entrusted by the legislature with the execution of a power from which mischief may result to the public, is bound to take especial precaution to guard against such mischief, and in default is responsible in damages.

Lord ELLENBOROUGH.—In point of law, I am clearly of opinion, that where any Company, such as the *Gas-Light Company*, is entrusted with the execution of a power from which mischief may result to the community, they are bound to execute it as innocently as they can, even in the day time; and in the night time, are bound to take especial precaution that no one shall receive injury. Here the trench was left open at night; the defendants ought not to have allowed so large a portion to remain open; but if they did, it was their duty to have guarded it with especial care: there was no light set up for the purpose of warning the passenger of

1816. his danger, and the mound was not sufficient to prevent the mischief which ensued.

WELD

v.

The GAS-
LIGHT COM-
PANY.

Verdict for the plaintiff.

Topping and Curwood for the plaintiff.

Garrow, A. G. for the defendants.

[Attornies, *Adams and Walker.*]

Same day.

HECTOR and Another v. CARPENTER.

If a party who is bail to the sheriff apply to an attorney to put in bail above, he is liable for these expences, but not for the subsequent expences of the suit. *Primá facie* the expences of the suit are due from the principal, and the charges of the bail for putting in bail above from the bail.

ASSUMPSIT on an attorney's bill for the expences of putting in bail above, and the subsequent expences of the cause, in which *Carpenter* had been bail to the sheriff.

The cause was ultimately referred, but in the course of the trial, Lord *Ellenborough* said—I think, that in point of law, if a party, who is bail to the sheriff, apply to an attorney to have bail put in above, he is liable for those expences but not for the subsequent expences of the principal suit, for that would be undertaking for the debt of another. *Primá facie* the expences of the suit are due from the principal, and the charges of the bail for putting in bail above from the bail.

The

The *Attorney General* and *Adolphus* for the plaintiff.

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HECTOR
and ANOTHER
v.
CARPENTER.

Topping for the defendant.

[Attornies, *Briggs* and *Allen*.]

SOLOMONS and two Others v. MEDEX.

Same day.

CASE for slanderous words affecting the plaintiffs in their trade of silversmiths.

An averment that slanderous words were spoken concerning the (three) plaintiffs in their joint trade, is not supported by evidence of words, addressed by the defendant personally, to one only of the partners.

The declaration alleged, that the defendant spoke of and concerning the plaintiffs in their trade, these words: "You (meaning the said partners) have bought a pearl necklace, which was stolen from me, for less than one-seventh of the value, will you give up the necklace, otherwise I will take you to *Bow-street*."

It appeared, that the three plaintiffs carried on business in partnership, and that the words were spoken by the defendant in their shop, and addressed to *John Solomons* (one of the plaintiffs) alone, the other plaintiffs not being present.

Lord ELLENBOROUGH was of opinion, that there was a fatal variance between the declaration, which alleged the words to have been spoken of and con-

1816. }
 PLOMER
 and Others
 v.
 LONG.

cerning the three plaintiffs in their character of tradesmen, and the words proved which were addressed to one of the partners individually, and the plaintiff was

Nonsuited. (a)

The Attorney-General and Reader for the plaintiff.

Scarlett for the defendant.

[Attornies, *Briggs* and *Oakley*.]

(a) See *Barnes v. Holloway*, 8 T. R. 150. *The King v. Berry*, 4 T. R. 217. 2 East, 434. *Lady Ratcliffe v. Shubley*, Cro. Eliz. 224. *Hawkes v. Hawkey*, 8 East, 227. *Helly v. Hender*, 3 Bulst. 83.

Same day.

BACON v. CHESNEY.

A. engages to guarantee the amount of goods supplied by B. to C. provided 18 months credit be given, if B. give credit for 12 months only, he is not entitled at the expiration of six months more, to call upon A. on his guarantee. But B. having after the commencement of the action, delivered an invoice from which it appears that credit was given for 12 months only, is at liberty to shew that this was a mistake, and that in fact 18 months' credit was given.

ASSUMPSIT on a guarantee, by which the defendant undertook to guarantee to the plaintiff the payment of a small vestment of goods out of fashion to be supplied to *Blair*, the mate of an Indiaman, on reasonable terms, at eighteen months credit.

Gaselee, for the plaintiff, proposed to give evidence of what *Blair*, the principal, had said concerning the goods on his return from *India*; but

Lord

Lord ELLENBOROUGH was of opinion, that what *Blair* afterwards said was not evidence, since he was not the general agent for the defendant.

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v.

CHESNEY.

Campbell, for the defendant, gave in evidence an invoice signed by the plaintiff, giving only twelve months credit to *Blair*; but it afterwards appeared that this had not been delivered until after the commencement of the action.

Lord ELLENBOROUGH.—The claim as against a surety is *strictissimi juris*, and it is incumbent on the plaintiff to shew that the terms of the guarantee have been strictly complied with (*a*). If I engage to guarantee, provided eighteen months credit be given, the party is not at liberty to give twelve only, and after the expiration of six more to call upon me. If this invoice had been delivered at the same time with the goods, or if it had been delivered under a Judge's order, the plaintiff would have been bound by it, but under the present circumstances I think he is at liberty to shew that it is a mistake. (*b*)

Verdict for the plaintiff.
Gaselee

(*a*) As against a surety, a contract cannot be carried beyond the strict letter of it. Per *Buller J.* 2 T. R. 370. and see *Phillips v. Astlino & al.* 2 Taunt. 206.

(*b*) The courts are unwilling to extend the doctrine of *estoppels*, because it tends to prevent the investigation of truth, see Lord Ken-

yon's dictum *R. v. Lubbenham*, 4 T. R. 254. and upon the same principle, it seldom happens that a party is precluded by his admission or representation from shewing that he acted under a mistake. So that a receipt is not conclusive evidence against a party signing it, and he may shew that he did not in

1816.

Gaselee for the plaintiff.

BACON

v.

Campbell for the defendant.

CHESNEY.

[Attornies, *Allen* and *Platt*.]

in fact receive the sum in question. See *Stratton v. Rastall*, 2 T.R. 366 and solemn declarations by the party in many cases, even where there has been no mistake are not *conclusive*. It has been held that upon an information for an offence under the game laws, the party is not concluded by the oath he had taken before the commissioners under the property-tax act, as to the annual value of his property, *R. v. Clark*, 8 T.R. 220. So the circumstance of an insolvent's not including a debt in his schedule will not preclude him from afterwards recovering the debt. See *Hart v. Newman*, 3 Campb. 13.

But in general the declaration and conduct of the party is admissible in evidence against him, and in many instances has been held to be *conclusive*. One who has described himself to be a physician cannot afterwards maintain an action for fees, *Chorley v. Bolcott*, 4 T.R. 317. *Lipscombe v. Holmes*, 2 Campb. 441.

A vendee of goods who has given to the vendor a bill of exchange in payment, cannot afterwards dispute the reasonableness of the charge. *Nash v. Turner*, 1 Esp. 217. and *supra*. 51. A bankrupt who has acquiesced in a commission for three years, and who has solicited the votes of creditors in the choice of assignees, is

estopped from bringing an action to the validity of the commission. *Like v. Howe & Rogers*, 6 Esp. 20. *Flower v. Heber*, 2 Ves. 236. 3 Esp. 223. 11 Ves. jun. 409. and see the case cited by *Richards*, B. 1. Price, 83. in which Lord *Kenyon* held, upon a trial for forgery, that the defendant having in his address to the jury spoken of the woman who then accompanied him as his wife, could not afterwards call her as a witness, although he alleged when the objection was made that she was not his wife; (but *qu.*) See *Mary Ady's* case, *Leach*, 245. So if a man hold out a woman to the world as his wife, he cannot set up as a defence to an action for necessities that she was not his wife. *Robinson v. Nabon*, 1 Campb. 245. *Watson v. Threlkeld*, 2 Esp. 637.

There seems to be an essential distinction between those representations on which another party may be presumed to have acted, or on the faith of which some advantage has been gained, and those by which the interests of another cannot be supposed to have been affected. If a man represent a woman to be his wife, he undertakes to repay any third person who will supply her with necessities, and to allow him afterwards to retract, would be to permit him to defeat his own contract, but where as in the cases of *R. v. Clarke* and

and *Hart v. Newman* above cited, the party does not by the falsifying his former declaration, break good faith with the opposite party, there seems to be no sufficient reason why the real facts should not be

disclosed, since although the party may by such evidence shew himself to have acted immorally and illegally, yet his offence and its punishment are entirely foreign to the existing inquiry.

1816.

BACON

v.

CHESNEY.

Lord KING v. CHAMBERS and Another.

Monday,
February 19.

THIS was an action against the defendants, two of the inhabitants of the Hundred of *Ossulston*, to recover the amount of the damage sustained by the plaintiff's house in *Wimpole-street*, from an attack of the mob during the Corn Bill riots.

Proof that the mob, after breaking open the door, tearing down the windowframes, and doing other serious damage to a house, were interrupted in their proceedings by a military force, is evidence from which a beginning to demolish (in an action against the hundred) is to be presumed, but if the mob after committing such mischief voluntarily retire, without proceeding to demolition, it is a question

It was proved, that the mob put out the lamps in the street, broke open the door, tore down the railing before the house, and broke the shutters and window frames, and after doing other damage to a considerable amount retired, and that in about five minutes afterwards the street was occupied by the military.

Gurney, for the defendants, admitted that if the mob intended to demolish the house a sufficient degree of violence had been proved, but contended, on the authority of *Reid v. Clarke* and another, 7 T. R. 496. (before *Thompson*, Baron, at *Newcastle*), that if it was merely the intention of the mob to

for the jury, whether there was a beginning to demolish.

express

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 v.
 CHAMBERS
 and Another.

express their indignation by doing mischief, and dispersing without proceeding to a demolition, the action could not be supported.

The *Attorney-General*.—The mob must be taken to have intended that which they actually began to do, namely to demolish the house; the consequences would be dreadful if this doctrine were allowed to prevail, and if a mob could say we have just done mischief enough to the party, now let us leave him, and he will be without any remedy.

LORD ELLENBOROUGH. — I do not know any case where the mob have not been interrupted in the course of demolition by the interference of the military, and where after the work of demolition had been begun, they would not have gone through if they had not been interrupted, and where they have retired, if I may use the expression, unsatiated. The proof would have been abundantly sufficient, if the mob had been dispersed by the military, whilst they were occupied in the demolition. The words of the statute are, beginning to demolish, and there must be proof that such was their intention.

The plaintiff's counsel requesting that the case might be left to the jury, his Lordship said,

There is in this case without doubt a sufficient beginning to demolish under the statute, provided the violence was used with an intention to demolish.

lish. We can only infer what the mob intended to do from what they did; and what they had begun to do, is striking evidence to shew what they intended to do; but if they went away voluntarily of their own head, the question for your consideration is, whether they ever intended to demolish. — If the military were near when the mob dispersed, it would be fair to attribute the dispersion to the military. If they dispersed voluntarily, and without having satiated their purpose, it will be for you to consider whether what they did was done with an intention to demolish.

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Lord KING
v.
CHAMBERS
and Another.

Verdict for the defendants.

The *Attorney-General*, and *Puller* for the plaintiff.

Gurney for the defendants.

[*Attornies, Karlake and Allen.*]

See 2 Will. Saund. 377. note (12) where many of the decisions under this act, (i. e. the 1 G. 1. st. 2. c. 5. s. 4) are collected. See also *Burrows v. Wright* 1 East, 615. *Greasley v. Higginbotham*, 1 East, 636. In the case of *Smith v. Bolton*, which was tried before *Le Blanc J.* at the *York Spring* assizes 1816, it was held in an action on this statute, that the hundred was liable only for the furniture and other articles actually demolished by the mob, and not for such as had been stolen and carried off.

When the legislature had thought proper to make the beginning to demolish a house, &c. a capital offence, it was also deemed proper to give the person injured a remedy against the hundred, since otherwise inasmuch as the private injury had by the operation of the act merged in the felony, the party would have been left without remedy. But in the case of a larceny accompanying the beginning to demolish, the party would have had no remedy previous to the st. 1 G. 1. st. 2. c. 5., and therefore he was not within

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and Another.

within the scope of the sixth section of that statute, as to the larciny, since the object of that section was to provide a remedy in place of that taken away by the fourth section.

Same day.

GANDALL v. PONTIGNY.

A. being employed by B. as a clerk at a salary of 200*l. per annum*, payable quarterly, is discharged in the middle of a quarter and paid proportionally, A. is entitled to recover his salary for the remainder of the quarter on the general count for work and labour.

DECLARATION for work and labour.

The plaintiff had been employed as a clerk by the defendant, in his counting-house, at a salary of 200*l. per annum*, which had been paid quarterly. The defendant being displeased with the plaintiff's conduct, on the 11th of *August* (in the midst of a quarter,) discharged him, paying him 25*l.*, the proportionate salary for half a quarter, which would expire on the 15th of *August*. The plaintiff tendered himself the next morning at the counting-house, as ready to discharge his duties as usual, when the defendant declined his services.

Topping for the defendant contended, that the plaintiff was not entitled to recover on the general count for work and labour, since none had been performed subsequently to the period of his discharge, and up to that time he had been paid, and he cited *Hull v. Heightman*, 2 *East*, 145. The plaintiff, he urged, ought to have declared specially on the contract.

Lord

Lord ELLENBOROUGH. — If he has done work for any part of the quarter, it is done for the whole. This is an objection of a strict nature, and since no dissolution of the contract has been proved, the plaintiff is entitled to recover for the remainder of the quarter.

1816.
GANDALL
v.
FONTIGNY.

Verdict for the plaintiff.

The *Attorney General* and *Dowling* for the plaintiff.

Topping and *V. Lawes* for the defendant.

[Attornies, *Manning* and *Orchard*.]

MACFARLANE v. PRICE.

Tuesday,
February 20.

THIS was an action upon the case, for infringing a patent.

The patent was described generally as a patent for certain improvements in the making of umbrellas and parasols.

The specification professed to set out the improvements as specified in certain descriptions and drawings annexed.

instrument without making such distinction, although a plate is annexed, containing a detached and separate representation of the parts in which the improvement consists.

In the specification of a patent for an improved instrument, it is essential to point out precisely what is new and what is old, and it is not sufficient to give a general description of the construction of the in-

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 M'FARLANE
 v.
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The subjoined description contained a minute detail of the construction of umbrellas and parasols, partly including the usual mode of stretching the silk of the umbrella by means of metallic stretchers, or rods attached to a tube moveable along the stem, and also certain improvements, which consisted chiefly in the insertion of the stretchers, which were knobbed at the end, in sockets formed in the whalebone, instead of attaching them to the whalebone in the usual way, by means of forked ligaments, which came in contact with the silk. The advantage of which was, that by the specified mode, the bone being interposed between the stretcher and the silk, the stretcher did not wear the silk in spreading the umbrella, as it was apt to do in umbrellas of the old construction, where the stretcher came in contact with the silk. Some other advantages of minor importance were also stated, and drawings were given of the umbrellas and parasols in their improved state. Throughout the whole specification no distinction was made between what was new and what was old.

Upon the objection taken by *Topping* for the defendant ;

The *Attorney-General* for the plaintiff, contended, that the specification was sufficient, since one of the annexed drawings contained a representation of the particular invention which had been pirated, and was confined to the exhibition of the insertion of the knobbed stretchers in the whalebone sockets,
 from

from which an artist would be able to construct an umbrella on the improved plan.

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M^r. FARLANE
v.
PRICE.

LORD ELLENBOROUGH. — The patentee in his specification ought to inform the person who consults it, what is new, and what is old. He should say my improvement consists in this, describing it by words if he can, or if not by reference to figures. But here the improvement is neither described in words nor by figures, and it would not be in the wit of man unless he were previously acquainted with the construction of the instrument to say what was new and what was old. The specification states, that the improved instrument is made in manner following: this is not true, since the description comprises that which is old, as well as that which is new. Then it is said, that the patentee may put in aid the figures, but how can it be collected from the whole of these in what the improvement consists. A person ought to be warned by the specification against the use of the particular invention, but it would exceed the wit of man to discover from what he is warned in a case like this. (a)

Plaintiff nonsuited.

The

(a) It appears at one time to have been held, that a patent for an addition or improvement was not maintainable. *Bircot's case*, 3 Ins. 184. and Mr. J. Buller's observations, 2 H. B. 488., but it has for some time been fully settled that such a patent may be supported, see the case of *Boulton v. Bull*, 2 H. B. 462. and the case of *Morris v. Branson* cited by Buller J. and *Hornblower v. Bolton*, 3 T. R. 95. But

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CASES AT NISI PRIUS,

1816.

FARLANE

PRICE.

The *Attorney-General, Gurney, and Storks* for the plaintiff.

Topping, Scarlett, and Gaselee for the defendant.

[Attornies, *Tatbam and Gregson.*]

But in *Jessop's* case (cited in the last case) a patent was held to be void because it extended to the whole watch, and the invention was of a particular movement only. — For a patent for the invention consisting in an improvement only, can give no right to the engine or to any thing beyond the improvement itself. And the public have a right to purchase that improvement by itself, without being encumbered with other things. But where the party obtained a patent

for a new machine, and afterwards another patent for improvements in the said machine, in which the grant of the former patent was recited, it was held that a specification, containing a full description of the whole machine so improved, but not distinguishing the new improved parts, or referring to the former specification, otherwise than as the second patent recited the first, was sufficient. *Harmer v. Playne*, 11 East, 101.



Same day.

RICHMOND v. HEAPY and Another.

One of three partners undertakes to provide for two bills of exchange drawn by the three partners, and

accepted by a fourth person, when they shall become due, such acceptances will not support a commission of bankrupts, on the petition of the three partners against the acceptor. Although the conduct of the partner may as against his co-partners have been fraudulent.

THIS was an action of trover brought by the plaintiff, who had been declared a bankrupt, against the defendants, who were the assignees under the commission, to try the validity of the commission.

Tr

The question was, whether the commission was supported by a good petitioning creditor's debt.

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and Another.

The defendants relied upon proof of two bills of exchange for 65*l.* 11*s.* each, drawn by *Heapy*, *Spear*, and *Wright*, the petitioning creditors, which purported to be for value received in oil, and accepted by the plaintiff. The plaintiff met this case by evidence of transactions between the plaintiff and *Spear*, from which it appeared that the produce of the oil had been employed by the plaintiff in taking up his previous acceptances for the accommodation of *Heapy*, *Spear*, and *Wright*, and that the bills in question had also been accepted for their accommodation; and he also gave in evidence an undertaking on the part of *Spear* to provide for these acceptances when they should become due.

The defendants contended, that the whole transaction between the plaintiff and *Spear* was collusive with a view to defraud the two partners of *Spear*, and were proceeding to offer evidence to that effect—

LORD ELLENBOROUGH. — I think the material question will be on the paper in which *Spear* engages to provide for the acceptances when they should become due. Suppose that an action had been brought by the three partners on these bills, would it not have been an answer that one of the plaintiffs had promised to provide for the bills? are they

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and Another.

they not bound by his acts when they are to recover by his strength?

Topping submitted, that the two partners could not be bound by the fraud of the third, and alluded to what had passed on a former occasion when this case came under the consideration of the court upon a motion for a new trial, when he conceived the court to have expressed an opinion to that effect.

LORD ELLENBOROUGH.—Assuming fraud, and that *Spear* was the most fraudulent man alive, yet since you must recover through him, if he has so behaved, that he cannot recover as one of the three, he cannot be a petitioning creditor. I recollect that on the occasion alluded to, I cited *Hope's* case, and I think that case was rightly decided, but it does not cover this case; there the partners were defendants, but here they are suing. This circumstance makes all the difference, they must sue jointly, and a release given by one would be binding on the rest. I am willing to put the case into any shape you chuse, or, if you think proper, tender a bill of exceptions.

In addressing the jury, his Lordship repeated his opinion, that the undertaking by *Spear* would have been an answer to an action by the three partners, and that if they could not support an action at common law upon the bills, they could not make them the subject of debt as petitioning creditors,

ditors, so as to support the commission. That the question, whether *Spear* had deceived his partners or not was immaterial, but that if they thought fit they might give their opinion on the question of fraud.

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RICHMOND
v.
HEAPY
and Another.

Verdict for the plaintiff.

The *Attorney General* and *Marryatt* for the plaintiff.

Topping and *Comyn* for the defendant.

[Attornies, *Skirrow* and *Cobb*.]

See the authorities 1 *Montague* on the bankrupt laws, B. 1. part 1. sec. 1. and the case of *Bickerdike v. Bollman*, 1 T. R. 405.

Lord COCHRANE v. SMETHURST.

Thursday,
February 22.

ACTION for infringing the plaintiff's patent.

The patent was granted "For an improved method of lighting cities, towns, and villages."

A patent for an improved mode of lighting cities, towns, and villages, is not supported by a specification describing an improved lamp.

From the specification it appeared, that this object was intended to be effected by means of a lamp of a new and very ingenious and simple construction; in some respects the patent lamp was similar to *Argand's*, the atmospheric air was intro-

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duced by a tube, and brought into immediate contact with the flame, but instead of the glass chimney which is essential to *Argand's* lamp, a metallic tube, called the eduction-pipe, was placed perpendicularly over the flame, and after passing through the roof of the case communicated with the external air. The advantage of this construction was, that the heated air was forced with considerable rapidity through the eduction-pipe, and having been conveyed to the exterior of the case could not return into the case (which was termed the line of exclusion), and the flame was perpetually fed by a current of fresh atmospheric air. In *Argand's* lamp a current of fresh air was also produced by means of the glass chimney placed over the flame, but this was inapplicable to the purpose of lighting a street, since if placed in a case the vitiated air confined in the case would again come into contact with the flame, and the combustion would in consequence be less rapid. Another advantage was, that the metallic tube of the patent lamp could be brought nearer to the flame than the glass chimney of *Argand's* lamp, and in consequence the draught was more rapid and the return of the vitiated air more completely excluded. The new principle in which the improvement consisted was very clearly exhibited by means of a figure representing the case called the line of exclusion, and the admission and eduction pipes. The application of the principle was also exhibited in many descriptions and plates, shewing how the improved lamp might be used ornamentally and usefully in lighting not only streets

but churches, theatres, &c. of which various applications the patentee in his specification claimed the benefit.

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 SMETHURST.

It clearly appeared from the plaintiff's evidence, that the use of the eduction-pipe was new and very useful; and it also appeared that the defendant, to whom Lord Cochrane had confided his secret, and whom he had employed as being a skilful artist in making lamps for the purpose of experiment, had availed himself of the invention.

The following objections were made to the patent and specification :

1. That the patent was too large and indefinite in its terms, being for an improved mode of lighting, &c. without taking any notice of any improvement of any lamp, &c.

2. That the specification was larger in its terms than the patent, the latter being for an improved mode of lighting cities, towns, and villages, the former claiming the benefit of its application to lighting churches, theatres, &c.

3. That the patentee had not sufficiently defined what he meant by the line of exclusion.

4. That it had not been specified that the outward air should be excluded from the case, except as to the portion which was conveyed through the admission pipe, in order to feed the lamp.

5. That upon the evidence it appeared, that the improvement rested entirely upon the combination of parts known before, but in the specification the

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plaintiff claimed the benefit of each part separately, viz. 1. The admission-pipe ; 2. The eduction-pipe ; 3. The line of exclusion ; 4. The mode of raising the burner, without stating a claim for the whole together.

LE BLANC, J.—I am of opinion, that the patent cannot be sustained. The plaintiff has obtained his patent not for an improved street-lamp, but for an improved method of lighting cities, towns, and villages ; but from the specification it appears, that the invention consists in the improvement of an old street-lamp, by a new combination of parts known before. The patent, therefore, is too general in its terms ; it should have been obtained for an improved street-lamp, and not for an improved mode of lighting cities, towns, and villages.

Plaintiff nonsuited.

The Attorney-General, Topping, Richardson, and Brougham, for the plaintiff.

Marryatt, Gaselee, and Adolphus, for the defendant.

[Attornies, *Pike and Abbott.*]

COURT OF COMMON PLEAS.

SITTINGS IN LONDON.

ATKYN'S v. BALDWIN.

1816.

THIS was an action on a special undertaking by the defendant to reside in *Spain*, and to discharge the duties of a commercial agent there. Breach, the non-delivery of certain vouchers to the plaintiff.

The plaintiff, it appeared, supplied the *British* army in the peninsula with provisions, and the principal object of the action was to procure certain vouchers to be verified by the defendant, without which the accounts of the plaintiff could not be passed.

The action was ultimately referred, *Gibbs*, C. J. intimating his clear opinion, that it would be within the jurisdiction of the arbitrator (to whom all matters in difference were referred), to direct that the defendant should go before the commissary, and verify the vouchers in question.

Vaughan Serjt. and *Gifford* for the plaintiff.

Lens Serjt. and *Tindal* for the defendant.

It is within the scope of the jurisdiction of an arbitrator, to whom all matters in difference are referred, to direct one of the parties, who has acted as agent for the other in supplying provisions to the *British* army, to go before the commissary and verify particular documents.

See

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See the case of *Spigurnell v. Jené*, 1 Sid. 12. where two out of the three justices were of opinion that an award directing the defendant to make submission for slander-

ous words (spoken of the plaintiff,) before the Mayor of *Taunton* was good, and see 6 Mod. 221. 2 Lord Ray. 1039. 1 Salk. 76.

BIRCH and Another v. DEPEYSTER.

By the contract between the owners and captain of an *India* ship the latter is to receive a certain compensation in lieu of *privilege* and *primage*; a conversation between the parties previous to the contract is evidence to shew in what sense they intended to use the word *privilege*.

THIS was an action of assumpsit brought by the owners of an *India* ship, against the captain for the amount of freight received by him. By the contract between the parties, the defendant was to receive a stipulated sum in lieu of *privilege* and *primage*. The freight claimed had been earned in respect of goods carried in the cabin, and the principal question was, whether the terms of the contract excluded all right on the part of the captain to use the cabin for the carriage of goods on his own account.

On the part of the defendant it was proposed to give in evidence a conversation between the parties before the agreement was entered into, in the course of which it had been expressly stated by the plaintiffs, that the defendant was to have the use of the cabin entirely to himself.

For the plaintiffs it was contended, that no evidence was admissible by way of explanation, except

as to the general meaning of the term *privilege* in mercantile understanding.

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BIRCH
and Another
v.
DEFEYSTER.

GIBBS, C. J.—The distinction which you take is, that evidence may be received to shew what the mercantile part of the nation mean by the term *privilege*, just as you would look into a dictionary in order to ascertain the meaning of a word, and that it must then be taken to have been used by the parties in its mercantile and established sense. But I think that the word *privilege* is of so indeterminate a signification, that I must receive this evidence. It is certainly evidence, and in the way in which it is offered falls within the general current of mercantile understanding, since they had previous to the agreement a conversation on the subject of *privilege*; to this extent it is evidence if not further, and if the term has been used in different trades in different ways, the conversation is evidence to shew in which sense it was used on the present occasion.

The conversation was then admitted, and being to the effect stated was held to be decisive of the case.

Verdict for the defendant.

Lens and *Best* Serjts. and *Campbell* for the plaintiff.

Shepherd Serjt. and *Taddy* for the defendant.

See

1816. See *Edie and Another v. The East India Company*, Burr. 1216. *Iggulden v. May*, 7 East, 327. 9 Ves. Jun. 325. *R. v. The Inhabitants of Laindon*, 8 T. R. 379. and see 2 Evans's Pothier, p. 203. et sequen.

BIRCH and Another v. *Syers v. Bridge*, Doug. 509. *Cooke v. Booth*, Cowp. 819. *Withnall v. Gartham*, 6 T. R. 388. *Baynham v. Guy's Hospital*, 3 Ves. Jun. 295.

DEPKYSTER.

Saturday,
February 24.

LEVY v. COSTERTON.

Under a covenant in a charter-party that the ship shall be provided with every thing needful and necessary for the voyage, the owner is bound to provide the proper documents as well as necessaries for the ship itself.

And is therefore bound to provide a bill of health, if it be essential to the performance of the voyage, within a reasonable time, within the intention of the parties.

THIS was an action of covenant on a charter party of affreightment on a voyage to *Cagliari*, and home again, by which the defendant covenanted that the vessel should be tight, staunch, and provided with every thing needful and necessary for the voyage: — Breach, that the defendant had not provided a bill of health, which was averred to be necessary for the voyage, and that in consequence of the omission, great delay had been occasioned in the delivery of the outward-bound cargo, and considerable profits had been lost.

Best Serjt., for the defendant contended (*inter alia*),

1st. That no documents were included in the terms of the covenant, and that

2dly. Supposing that the terms of the covenant included documents, they did not extend to a bill of health, which was not a document required by the general law of states.

12

But

But GIBBS C. J. was of opinion that the words in fair construction, were not to be confined to such things as should be necessary for the ship itself, but that they comprehended every thing necessary for the voyage ; and upon the second point his Lordship was of opinion, that a bill of health was to be considered as a necessary document, since it was essential to the performance of the voyage, according to the intention of the parties within a reasonable time.

1816.

LEVY
v.
COSTERTON.

Verdict for the plaintiff.

Lens, Copley and Vaughan, Serjts. for the plaintiff.

Best Serjt. for the defendant.

[Attornies, *Wadson & Co.* and *Nelson*.]

See *Abbott on Shipping*, 3 Ed. p. 228.

1816.

Same day.

ALDRICH v. SIMMONS.

In an action against the owner of a ship, for the negligence of his pilot, who was employed both by the owner and by the captain, the pilot is a competent witness for the defendant though he has been released by him alone, and not by the captain.

CASE against the owner of a vessel for the negligence of his pilot, whereby the plaintiff's vessel was damaged.

The pilot, who was called as a witness for the defendant, stated, that he had been employed both by the defendant and the captain; and that he had been released by the defendant only.

For the plaintiff it was objected, that the witness was incompetent without a release from the captain also.

But GIBBS, C. J. held, that he was competent without such a release, since the captain could not be responsible to the owner for the misconduct of the pilot.

Verdict for the plaintiff.

IN THE KING'S BENCH.

 GUILDHALL.

WALTON v. HASTINGS.

1816.

 Monday,
 February 26.

THIS was an action of assumpsit by the payee against the acceptor of a bill of exchange, dated 10th of *July*, for the payment of 50*l.* two months after date. It appeared that *Brookes* the drawer, and the plaintiff, had had dealings together, in the course of which it was stipulated, that the plaintiff was to have the defendant's acceptance in payment, and accordingly *Brookes* drew the above bill, bearing date the 5th *July*, and delivered it to the payee. On the presentment by the payee to the defendant for acceptance, the latter wished the date to be altered to the 10th of *July*, and it was altered accordingly, without any communication with the drawer.

A. being indebted to B. draws a bill of exchange upon C. payable to B. two months after date, and upon presentment of the bill by B. to C. for acceptance the date is altered at the instance of C. without any communication with A. — B. cannot recover against C. on his acceptance for want of a new stamp.

Lord ELLENBOROUGH.—How can you recover on this bill without a violation of the stamp-act?

And *semble*. if A. had assented to the alteration a new stamp would still have been necessary.

Jervis, for the plaintiff, contended, that though the bill might have been avoided by the alteration as to the drawer, it was good as against the acceptor.

Lord

1816.

WALTON

v.

HASTINGS.

Lord ELLENBOROUGH.—The payee has acquired an absolute interest in a bill, dated on the 5th, and then the alteration is made without any communication to the drawer. I do not say that a communication to the drawer would have been available. I do not know that a bill void as to one for want of stamp can be good as to the other. A case was tried before Mr. J. *Le Blanc*, sitting here, where it was held, that a new stamp was not rendered necessary by the alteration, but there, the bill was *in fieri*, and the alteration made to correct a mistake, but here the bill was delivered to the payee in the course of payment, there was no mistake; I think the alteration was not warranted, and that the stamp was discharged.

Plaintiff nonsuited. (a)

Jervis and *Espinasse* for the plaintiff.

Topping for the defendant.

[Attornies, *Sbarve* and *Chester*.]

(a) See *Kershaw v. Cox*, 3 Esp. 246. above alluded to by Lord *Ellenborough*, see also *Webber v. Maddocks*, 3 Campb. 1. *Cole v. Parkins*, 13 East, 371. *Robinson and Others v. Touray*, 1 Maule & Selwyn, 217. an alteration in an immaterial part will not vitiate a bill. *Trapp v. Spearman*, 3 Esp. R. 57. *Marson v. Petit*, 1 Campb. 82. (n.) *aliter* if altered in a material point, as with respect to sums, dates, &c. *Bowman v. Nicboll*, 1 Esp. R. 81. 5 T. R. 537. *Cardwell v. Martin*, 1 Campb. 79. *ib.* 180. b. *Bayley* on bills, 24. *Master v. Miller*, 4 T. R. 320. 2 H. B. 141. 1 Anst. 225. *Long v. Moore*, 3 Esp. 155. see 1 Taunt. 420.

1816.

WOOD *v.* BROWN.Tuesday,
February 27.

THIS was an action of assumpsit by the indorsee of a bill of exchange against the drawer and indorser.

Evidence of a letter from the drawer and indorser of an accommodation bill, that the bill will be satisfied before the next term, supercedes the necessity of proving the dishonour of the bill and notice.

The plaintiff, in lieu of the usual proof of notice of the dishonour, &c. gave in evidence a letter of the defendant's, in which he stated, that he was an accommodation drawer, and that the bill would be paid before the next term. On the question, whether this was sufficient,

Lord ELLENBOROUGH said, the defendant does not rely upon the want of notice, but undertakes that the bill will be paid before the term either by himself or the acceptor. I think the evidence sufficient.

Verdict for the plaintiff.

Topping and Campbell for the plaintiff.

Nolan for the defendant.

See *Jones v. Morgan*, 2 Campb. 474. *Lundie v. Robertson*, 7 East, 231.

1816.

Thursday,
February 29.

WIGLESWORTH *v.* WHITE and his Wife.

The creditors of A. in consideration of his assignment of all his stock in trade and book debts to a trustee for the benefit of his creditors, agree to execute releases as soon as the property shall realize the sum of 238*l.* This agreement on the part of the creditors does not suspend their right of action against A., although they have taken security from a purchaser of the stock in trade, for the sum of 223*l.*

ASSUMPSIT for goods sold and delivered to the plaintiff's wife, whilst she was sole.

The delivery of the goods having been proved, the defendants proposed to prove, that the plaintiff, and other creditors of Miss *Jones* (who was a milliner), before her marriage with the defendant *White* entered into an agreement with her for a composition of her debts, in these terms: "At a meeting of the creditors of — *Jones*, &c. resolved, that in consideration of an undertaking by her to assign the whole of her stock in trade and book debts, &c. to a trustee, for the benefit of the creditors, we agree to accept the same in full of all demands, and to execute releases to the said — *Jones*, as soon as the property shall realize the sum of 238*l.*" This agreement was proved, and it was also proposed to prove, that the creditors had permitted a Miss *Lawrie* to take possession of the stock upon her executing a warrant of attorney to confess judgment as a security for 223*l.* the purchase money.

For the defendant it was contended, that the agreement operated to the suspension of the right of action, and that the bringing of the action was a fraud on the other creditors, and that at all events the

the plaintiffs could not recover more than the difference between 223*l.* and 238*l.*

1816.

WIGLES-
WORTH

v.

WHITE
and his Wife.

But Lord ELLENBOROUGH was of opinion, that although if it could have been shewn that the whole of the stock had been taken by the creditors in satisfaction of their debts, it would have been an answer to the action as an accord and satisfaction; yet that it was impossible, under the circumstances, to consider the creditors as having agreed to take less than 238*l.* in satisfaction of their debts. And the plaintiff had a verdict for the full amount.

Topping and *E. Lawes* for the plaintiff.

Garrow, A. G. and *Comyn* for the defendants.

ATKINSON v. Lord BRAYBROOK.

March 1.

DEBT on a judgment recovered in *Jamaica*.

Puller submitted, that the plaintiff was entitled to interest from the time of the judgment.

The plaintiff in an action of debt on a judgment recovered in *Jamaica*, is not entitled to recover interest.

But Lord ELLENBOROUGH held, that the debt was to be considered as a simple contract debt; and that the plaintiff was not entitled to interest.

Verdict for the plaintiff.

q 2

Puller

1816.

Puller for the plaintiff.

ATKINSON
v.
Lord BRAY-
BROOK.

Gaselee for the defendant.

Same day.

DUNN v. BODY.

After a special agreement between A. and B. for the purchase by A. of unfinished houses to be finished by B. at his own expence, it is agreed that A. shall finish them, and that B. shall repay to him the amount of the expences; A. cannot recover against B. for such expences on the common counts in *indebitatus assumpsit*. A. delivers to B. a quantity

THIS was an action of *indebitatus assumpsit* for goods sold and delivered, and money paid.

It was stated, for the plaintiff, that an agreement had been made, according to which he was to deliver cordage to the amount of 1200*l*. as the consideration for six unfinished houses to be finished by the defendant; and that it was further stipulated at a subsequent period, that the houses should be finished by the plaintiff, and that the expences of the completion should be paid by the defendant to the plaintiff, and the latter now claimed the amount of such expences.

But Lord ELLENBOROUGH held, that since this was part of the agreement, the plaintiff could not recover without the aid of a special court.

of cordage as the consideration for a special undertaking by B., A. is not precluded by the special contract from recovering under the common counts for the excess of cordage delivered beyond the quantity stipulated for as the consideration, (provided that amount be adjusted,) although it may be necessary to give in evidence the terms of the special contract.

The

The plaintiff also claimed for an excess of cordage delivered beyond that which was the consideration for the houses.

1816.

DUNN
v.
BODY.

Garrow, A. G. contended, that the plaintiff could not, under the common counts, recover for the excess, since, in order to ascertain the amount, it would be necessary to enter into the terms of the special agreement.

But Lord ELLENBOROUGH was of opinion that the plaintiff was entitled as for goods sold and delivered, as soon as the quantity exceeded that which had been stipulated for, and to make the completion of the agreement the stage on which the subsequent claim was founded, though it might have been otherwise if the amount to be delivered under the agreement had remained unadjusted.

The plaintiff was afterwards nonsuited.

Topping and *Marryatt* for the plaintiff.

Garrow, A. G. for the defendant.

[Attornies, *King* and *Tomlinson & Co.*]

1816.

BUTLER v. ALLNUTT.

A licence is granted to A. and B. for permitting vessels bearing any flag to import certain specified articles; in order to shew the legality of the voyage in an action against an insurer, it is sufficient to shew that the licence has been applied to the ship and voyage in question, without further connecting the plaintiff with A. and B. to whom the licence was granted.

If articles not specified in the licence be imported along with others, which are specified, (*sem-*

ble), the licence will still enure to the protection of those articles which are specified.—The licence having been deposited in the custom-house and accidentally destroyed, it is to be presumed that the time of clearance as required by the order in council, was indorsed upon it, upon its being shewn that without such indorsement the custom-house would not have permitted the entry to have been made.

ASSUMPSIT on a stipulation in a policy of insurance to return four *per cent.* of the premium, on the safe arrival of the vessel in the port of *London* from *Bordeaux*.

To shew the legality of the voyage, the plaintiff gave in evidence an order in council for three licences to *Butler* and another by name, for the permitting vessels bearing any flag to import certain specified articles. One of these licences had been applied to the ship in question.

Lawes for the defendant, objected,

1st. That the licence was to *B.* and another by name, and therefore could not enure to the benefit of the plaintiffs, unless further connected by evidence.

But Lord ELLENBOROUGH held, that since the licence was in respect of the vessel, and had been so applied, the cargo was clearly insurable.

2dly. That since the licence was for the importation of specific articles, not including cream of

tartar

tartar and antimony, which in fact formed part of the cargo insured, the introduction of these articles vacated the licence.

1816.
BUTLER
v.
ALLNUTT.

Lord ELLENBOROUGH. — The consequence is, that such articles would not be within the protection of the licence, it would be very dangerous if the introduction of a single article not specified in the order were to vacate the licence altogether. (a)

The licence itself had been deposited in the Custom-House, and burnt in the conflagration there.

Lawes objected, that it had not been proved, that the time of the clearance had been indorsed on the licence as required by the order in council; but on its being sworn that the Custom-House would not permit an entry without an indorsement on the licence, (which was proved to have been deposited in the Custom-House) of the time of clearance.

Lord ELLENBOROUGH held, that the proper indorsement was to be presumed.

Verdict for the plaintiff.

Barnwell for the plaintiff.

Lawes for the defendant.

[Attornies, *Blunt & Co.* and *Wiltshire & Co.*]

(a) See *Shiffner v. Gordon and Others*, 12 East, 296. *Feise v. Thompson*, 1 Taunt. 121. *Kensington v. Inglis*, 8 East, 273.

1816.

Same day.

HUNTER v. WELSH.

ASSUMPSIT for not accounting for goods delivered to the defendant, to be sold on the plaintiffs' account — also for goods sold and delivered, and money had and received to the plaintiffs' use. It appeared that a quantity of porter had been consigned to the defendant for sale.

If the agent to whom goods have been consigned by his principal for sale, refuse, after a reasonable time has elapsed, to account for them, it is to be presumed that the agent has sold them.

And in such case a bill of particulars, stating the demand to be for the goods, (which it specifies,) and for money had and received, &c. is sufficient.

J. Williams for the defendant, insisted, that the plaintiff was precluded by his bill of particulars from recovering, since it purported to be for goods sold and delivered to the defendant, and not for goods delivered to him, and for which he had refused to account, and that the plaintiff under the circumstances could not recover as for money had and received, no proof of any sale by the defendant having been given.

The bill of particulars was in this form :

G. W. to Wilson and Hunter,

— Tierces of Porter, &c. £ — — —

and it also contained items for money had and received, &c.

LORD ELLENBOROUGH.— It is not necessary to prove that the defendant actually received the money, in order to entitle the plaintiff to recover for money had and received to his use, for if after a reasonable time has elapsed, the defendant does

not account to the plaintiff, it may be presumed that he has received money for the goods, or the plaintiff may proceed against him for not accounting. The bill of particulars merely states the component ingredients of the debt, and is I think applicable to any of the counts in the declaration.

Verdict for the plaintiff.

Garrow A. G. and Pollock for the plaintiff

J. Williams for the defendant.

[Attornies, *Bryant and Atkinson.*]

1816.

HUNTER
v.
WELSH.

GIBBON and Others v. FEATHERSTONHAUGH.

Saturday,
March 2.

COVENANT to pay the amount of all bills to be drawn by the defendant on the plaintiffs, and accepted by them.

The plaintiffs produced bills of exchange, drawn by the defendant on the plaintiffs.

Richardson for the defendant, insisted that it was necessary for the plaintiffs to go farther, and prove payment of such bills.

But Lord ELLENBOROUGH held it to be sufficient that the bills were drawn by the defendant upon the plaintiffs,

In an action on a covenant by the defendant, to pay the amount of all bills drawn by him and accepted by the plaintiff, it is sufficient for the latter to produce the bills drawn by the defendant, without going on to prove payment of such bills.

1816.

GIBBON
and Others

v.

FEATHER-
STONHAUGH.

plaintiffs, and had come out of the hands of the latter.

Verdict for the plaintiffs.

The *Attorney General* and *Taddy* for the plaintiffs.

Richardson for the defendant.

[*Attornies, Tyrrell and Chibchase.*]

Monday,
March 4.

DICKSON v. LODGE.

In an action on a policy on goods. the bill of lading signed by the captain is not evidence to prove the plaintiff's interest in the goods.

An allegation that the policy has been effected for the plaintiffs by A. B. and C. is satisfied by proof that it was effected by the firm A. and B. there being in fact two firms which have two members in common.

ASSUMPSIT on a policy of insurance on a cargo of linen, deals, &c. on board the *Cuba*, on a voyage from *Gottenburgh* to the *Havannah* in 1813.

The plaintiff had admitted that he had effected insurances on the cargo, to the amount of 17,000*l*.

In order to shew that the goods insured were shipped on board the *Cuba* on the plaintiff's account, the bill of lading was tendered in evidence.

Lord ELLENBOROUGH rejected it as being nothing more than the declaration of the captain. —

The plaintiff then proved, that some deals and linen had been put on board, but was not prepared

to

to shew the amount, and it was admitted that this would entitle him to nominal damages.

1816.

DICKSON
v.
LODGE.

The plaintiff having closed his case :

Garro A. G. for the defendant, objected, that it had not been proved as alleged, both in the policy and in the declaration ; that the policy had been effected by *Gray, Wilson, and Co.* as the agents of the plaintiff, and that the plaintiff having now closed his case, was precluded from going into further evidence ; but upon its appearing that the defendant had agreed to admit the subscription to the policy, Lord *Ellenborough* permitted the plaintiff to go into further evidence. It then appeared that directions having been given to *Gray, Wilson, and Co.* a *London* house, to effect the policy, it had been effected by the *Liverpool* house of *Gray and Co.*, which consisted of the same component members with the *London* house omitting one.

Lord ELLENBOROUGH held, that if the two houses had had one member only in common, the policy would have been properly effected.

Verdict for the plaintiff.

Scarlett and *J. Parke* for the plaintiff.

The *Attorney-General* and *Richardson* for the defendant.

[*Attornies, Atkinson and Adlington.*]

1816.

Tuesday,
March 5.

RAMSBOTHAM and Others v. CATOR.

A bill delivered by the defendant to two partners for the purpose of being discounted, after the bankruptcy of one is indorsed over by the other partner to the plaintiffs, to whom they are largely indebted for advances. *Qu.* whether the plaintiffs under these circumstances are entitled to recover.

THIS was an action of assumpsit by the indorsees against the indorser of seven bills of exchange.

The principal question arose on a bill for 750*l.* which had been delivered by the defendant to *J. W. Hervey* and *M. B. Hervey*, who were in partnership as bankers, in order to get it discounted. *J. W. Hervey* and *M. B. Hervey* kept an account with the plaintiffs, who were bankers in *London*, and on the 23d of *May* this bill was delivered to the plaintiffs by *J. W. Hervey*, the son of *M. B. Hervey*, and was carried to the credit of *Hervey and Co.* At this period the plaintiffs were considerably in credence to *Hervey and Co.* but continued to make advances on their account up to the 24th of *June*.

J. W. Hervey had committed an act of bankruptcy on the 17th of *May*, on which a separate commission was sued out against him in the same month. *M. B. Hervey* committed an act of bankruptcy on the 23d of *June*, and a joint commission was sued out on the 8th of *July*.

For the defendant it was contended, that inasmuch as the bankruptcy of *J. W. Hervey* took place on the 17th of *May*, it was not competent to *M. B. Hervey* to transfer the bill (which had been delivered

delivered to the partners on a specific trust) to the plaintiffs on the 23d of *May*.

1816.
 RAMSDEN
 & Others
 v.
 CATON.

For the plaintiffs it was contended, that since the bill had been delivered to *Hervey and Co.* upon a specific trust, neither they nor their assignees could have maintained an action on the bill, and therefore that since no claim on the part of the assignees intervened to prevent a transfer to the plaintiffs, an indorsement after the bankruptcy of *J. W. Hervey*, was sufficient to transfer the interest. The cases of *Arden v. Watkins*, 3 East, 317. and *Willis v. Freeman*, 12 East, 656. were cited in illustration of the principle insisted on, viz. that where no interest in the instrument passes to the assignees, a legal interest is transferred by a party who indorses it after bankruptcy. The case of *Ramsbotham v. Lawes* (a) was also cited to shew that a solvent party was competent to assign property after the bankruptcy of other parties.

LORD ELLENBOROUGH.—So far I agree with the counsel for the plaintiff, that no interest could pass to the assignees; the question is, whether a party, without a knowledge of the trust, has acquired interest beyond that of the trustee? I will allow the plaintiffs to recover, reserving a liberty to the defendant to move the point. (b).

Verdict for the plaintiffs, subject to a motion as to the bill for 750*l*.

(a) 1 Camp. 279.

(b) The case was not moved.

1816.

RAMSBO-
THAM
and Others
v.
CATOR.

The *Attorney-General, Marryatt, and Curwood*
for the plaintiffs.

Topping and Richardson for the defendant.

[Attornies, *Walton and Willis & Co.*]

MITCHELL and Another v. GLENNIE and Others.

The owner of
a ship is liable
for stores and
necessaries
supplied by
the order of
the supercargo,
after the de-
tention and
liberation of
the vessel by a
foreign power,
although the
supplies are
afforded after
an abandon-
ment by the
owner to the
underwriters.
And although
the supplies
are furnished

ASSUMPSIT for stores and necessaries furnished
for the defendants' vessel.

In *January* 1813, the defendants dispatched the
San Nicolai on a voyage to *Pensacola*, with a super-
cargo on board, who was instructed to do his best
for the safety of the ship.

On the return of the vessel from *Pensacola* she
was captured by an *American* vessel, and carried
into *St. Mary's, Georgia*. The supercargo, by the
advice of those to whom the defendants had referred
him, applied to the plaintiffs for their assistance in
procuring the liberation of the vessel.

for the purpose of enabling the vessel to prosecute a second voyage, in the prosecution of
which she is seized by *British* officers and confiscated, yet the institution of proceedings
in the Admiralty Court by the defendant to recover possession of the vessel, amounts
to an adoption of the second voyage, and renders him liable for the amount.

The cargo was confiscated, but the vessel was directed to be released. An appeal having been entered against the release, the plaintiffs procured the ship to be liberated on bail, and afterwards furnished her with all necessaries, and also procured a valuable freight. She afterwards proceeded to *Bermudas*, where she was seized by *British* officers, and condemned.

1816.
 MITCHELL
 and Another
 v.
 GLENNIE
 and Others.

Garrow, A. G. for the defendants, contended, that since the defendants, after notice of the capture had abandoned to the underwriters, they were not liable for any supplies subsequent to the abandonment, and that the sum which had been paid into court was sufficient to cover the amount of the supplies antecedent to the abandonment.

But Lord ELLENBOROUGH was of opinion, that whatever claim might be made by the defendants upon the insurers, with respect to the plaintiffs, the defendants, when the ship was liberated, were liable just as they were before the detention, and were therefore bound by the act of their supercargo, who had authority from them to do his best for the ship.

The *Attorney-General* then contended, that at all events the plaintiffs were not entitled to recover for the supplies to enable the ship to proceed on a second voyage, which, from the subsequent confiscation, appeared to have been illegal.

Lord

1816.

MITCHELL
and Another

v.

GLENNIE
and Others.

LORD ELLENBOROUGH. — That certainly may be a material dividing point. The authority delegated by the owners only extended to the doing of that which could legally be done, and they are not bound by the illegal acts of their agents.

It afterwards appeared, that the defendants had instituted proceedings in the admiralty court to recover possession of the vessel.

LORD ELLENBOROUGH held, that this amounted to an adoption of the second voyage, and made the defendants liable down to the last moment.

Verdict for the plaintiffs.

Topping and Joy for the plaintiffs.

Garrow, A. G. and Marryatt for the defendants.

[Attornies, *Ellis* and *Druce*.]

See *Abbott*, part. 2. c. 3.

CAMPBELL and Another, Assignees of MULLETT
and Others v. HASSEL and Others.

1816.

ASSUMPSIT for the price of a quantity of skins
sold by the bankrupts to the defendants.

The contract had been made by *Taylor and Co.*
as the brokers for both parties, on the 19th of *October* 1813, to be paid for by bill at four months,
two and a half discount for ready money, prompt
in fourteen days.

It appeared, that the defendants knew that the
skins had been sold by *Taylor and Co.* as brokers,
for the vendors, but that the name of the principals
had not been disclosed to them.

The defence was, that the defendants had paid
Taylor and Co.

The plaintiffs contended, that such a payment
could not avail the defendants, since they knew
that *Taylor and Co.* acted as brokers only.

LORD ELLENBOROUGH.—There was no disclosure
of any absolute proprietor; in the late case of

bill at four months, two and a half discount for ready money, prompt in fourteen days, a
payment by bill at two months, deducting one and a half discount is no payment as
against the principal, although he makes no demand till after the expiration of the time
of credit.

VOL. I.

B

Morris

A payment by
the vendee of
goods to the
broker is good,
if the name of
the principal
be not dis-
closed, al-
though the
vendee knows
that the broker
sells for some
unknown prin-
cipal.

And it makes
no difference in
such case,
whether or not
the broker acts
under a *del*
credere com-
mission.

But a payment
in such case
would not be
good, if it va-
ried from the
original terms
of the contract.
And evidence
of a custom
to that effect is
not admissible.

And the
terms being a

1816. *Morris v. Cleseby* (a), in which all the previous authorities were considered, we held, that till the principal appears the broker is to be regarded as the proprietor.

CAMPBELL
and Another
Assignees &c.
v.

HASSEL
and Others.

Gurney. — In the case of *Morris v. Cleseby*, the broker acted under a *del credere* commission.

LORD ELLENBOROUGH. — We held, that that circumstance made no difference whatsoever.

It afterwards appeared, that the defendants had paid *Taylor and Co.* by a bill at two months, deducting one and a half discount; this had been received by *Taylor and Co.* without any authority from their principals to alter the terms of the original contract; but it was proposed to prove, that by the usage of the trade a bill at two months, with a deduction of one and a half discount, might be substituted for the original terms of two and a half discount for ready money, or a bill at four months.

But LORD ELLENBOROUGH peremptorily refused to hear any evidence to this effect, observing, that it would be productive of intolerable mischief to permit brokers to deviate from the original terms of the contracts.

Scarlett, for the defendants, then contended, that since the principals, who did not receive prompt

(a) Hil. 1816.

payment,

payment, made no demand of a bill at four months at the expiration of the prompt, but since, on the contrary, no demand had been made upon the defendants till the 3d of *March* (when the time of credit expired), they must be taken to have authorised the broker to receive payment.

1816.
CAMPBELL
and Another
Assignees &c.
v.
HASSEL
and Others.

LORD ELLENBOROUGH.—They omitted to do what they might have done; but they have not authorised the broker to do a *tertium quid*; the broker has received no payment under the terms of the contract, but has received a substitute without authority; and it appears that a demand was made at the time when the bill would have become due. The payment has not been so made as to be available against the assignees.

Verdict for the plaintiff,

Garrow, A. G. Marryatt, and Gurney, for the plaintiffs.

Scarlett for the defendants.

[Attornies, *Swain & Co.* and *Lamberts.*]

See *Kymer v. Suwercropp*, 1 Camp. 109. 180.

1816.

Wednesday,
March 6.

BOYSON v. WILSON.

In an action against the owner of a chartered vessel for negligence, in consequence of which the plaintiff's goods were lost, the non-arrival of the vessel at her destined port, is not even *prima facie* evidence of negligence.

ACTION against the charterer of a vessel on a voyage to *Senegal* and *Goree*, for negligence, in consequence of which the plaintiff's goods on board the chartered vessel were lost.

The plaintiff, in proof of the negligence, first relied upon evidence of the non-arrival of the vessel at her destined port.

But Lord ELLENBOROUGH was of opinion, that this was not sufficient to induce a presumption of negligence, it rather tended to prove a loss by perils of the seas.

The plaintiff was afterwards nonsuited.

The *Attorney-General* and *Richardson* for the plaintiff.

Topping for the defendant.

[Attornies, *Reardon & Co.* and *Crowder & Co.*]

NELSON v. MACINTOSH.

1816.

CASE for so negligently carrying the plaintiff's box, containing doubloons, dollars, and other valuables, that the box and its contents were lost; the declaration also contained a count in trover.

The captain of a vessel who carries the goods of another, though not for hire, is bound to take prudent care of them. And if he intermeddle with the chest of a seaman, who has been casually left behind, he is bound to restore it to its former state of security, particularly if the contents be valuable.

The plaintiff came on board the *Arundel*, of which the defendant was captain, at *Trinidad*, with intent to work his passage home, but being casually on shore at the time when the convoy made signal for sailing, was left behind. The plaintiff's box was stowed along with others on the quarter-deck, and soon after the departure of the vessel was opened by the defendant, upon a suggestion that it might contain contraband goods. The box was fastened with a lock, and the lid was also nailed down; as soon as the contents had been ascertained the lid was replaced and nailed down again with two large nails. Towards the termination of the voyage, the captain again opened the trunk in the presence of several passengers, and the contents having been put into a canvas bag were deposited in the captain's chest in the cabin, in which his own valuables were usually kept. When the vessel arrived at *Gravesend*, a river pilot was taken on board, and the captain and one mate left the vessel, another mate remaining on board; an excise officer was also on board, and two young men belonging

R 3.

to

1816. to the vessel were allowed to sleep in the cabin.
 NELSON On the next morning the captain's trunk contain-
 v. ing the valuables was missing, and was not after-
 MACINTOSH. wards discovered.

The defendant adduced evidence tending to shew, that the property had been stolen by persons unconnected with the vessel.

Lord ELLENBOROUGH, in his address to the jury, said, Every person who delivers goods to another to be carried for hire has a right to the utmost care; the carrier stands in the situation of an insurer, and is liable for all losses except those which are occasioned by the act of God or of the king's enemies, and where a person does not carry for hire, he is bound to take proper and prudent care of that which is committed to him. Such would have been the situation of the parties if no alteration had been made in the state of the box, but when the captain, from motives of prudence opened the box, he was bound to intermeddle so as to replace it in its former state of security, and to restore all the guards with which it had before been protected. In this case the defendant by his conduct exposed the property to peril and risk, and the value of the property imposed upon him an enhanced duty of vigilance, that his acts might not operate to the prejudice of the party. When he had ascertained the valuable nature of the property it was a duty imperative upon him to restore it to at least its former degree of security. Now what was done in this case? as they

they approached the land, the property was taken out of the box and put into a canvas bag. When the defendant had taken it wholly out of the box he was bound to make his own trunk in which it was deposited as secure as possible, it was no longer the box of a seaman working his passage home, but ascertained to be an article of great value which the defendant was therefore bound to watch with great care and diligence. His Lordship, after further commenting on the circumstances of the case, left it to the jury to consider,

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1st. Whether the captain had not, under the circumstances, by the intermeddling and removal, imposed on himself the duty of carefully guarding against all perils to which the property was exposed in consequence of the alteration.

2dly. Whether he had in fact carefully guarded the property, and that if they were of opinion that the conduct of the defendant had imposed upon him the duty of carefully guarding the goods, and that he had been guilty of negligence, they were to find for the plaintiff.

Verdict for the plaintiff.

Topping and Ross for the plaintiff.

The *Attorney-General* for the defendant.

[*Attornies, Templer and Rivington.*]

1816.

TODD and Others, Executors of TODD v. RITCHIE.

Improper treatment of the vessel by the captain will not constitute barratry, although it tend to the destruction of the vessel, unless it be shewn that he acted against his own judgment.

ASSUMPSIT on a policy of insurance; in one count of the declaration, the loss was alleged to have arisen from the barratry of the master.

After the vessel had left *Quebec* with her homeward cargo on board, she sprung a leak, and the captain put into *Gaspie*, in the gulph of *St. Lawrence*, and before any survey had taken place, he broke up her ceiling and end bows with crow-bars, in consequence of which the ship was much injured and weakened, this it was suggested was done in order to procure the condemnation of the vessel.

LORD ELLENBOROUGH:—In order to constitute barratry, which is a crime, the captain must be proved to have acted against his better judgment; as the case stands, there is a whole ocean between you and barratry.

The plaintiff afterwards elected to be nonsuited.

Garrow A. G. and Marryatt for the plaintiffs.

Topping and Campbell for the defendant.

[Attornies, *Crowder & Co.* and *Evans.*]

See *Abbott*, part. . c. 4. sec. 7. Emer. tom. i. p. 366.

Hogg and Others, Assignees of TURNER, a Bankrupt v. MITCHELL.

1816.

ASSUMPSIT for money had and received.

It was proposed on the part of the plaintiffs, to shew that *Turner* the bankrupt had before his bankruptcy, at the instigation of the defendant, induced different traders to give him credit, by purchasing goods to a small amount in the first instance, for which he punctually paid, and by continuing the practice, until he had lulled them into security. By these means the bankrupt (it was stated) had prevailed on many tradesmen to supply him with goods on credit to a large amount, which the defendant had afterwards sold, having purchased them from *Turner* at prices much below their value.

A. at the instigation of B. procures credit for goods to a large amount, which he sells to B. at very inadequate prices, in fraud of his creditors, the assignees of A. after his bankruptcy, cannot recover the difference from B.

It was contended on the part of the plaintiffs, that since the defendant had suggested this fraudulent course of proceeding to *Turner*, he was responsible to the assignees.

LORD ELLENBOROUGH. — I am very clear in opinion, however I may wish that such practices should be visited by the law, that if a party sell goods at a price far below their value, he cannot recover the difference, and that his assignees cannot stand in a better situation.

Plaintiff nonsuited.

Garrow

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Garrow A. G. and F. Pollock for the plaintiff.

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Topping for the defendant.[Attornies, *Gatty & Co.* and *Heard.*]

YORK SPRING ASSIZES.

Coram LE BLANC, Justice.

The KING v. SMITH and HORNAGE.

The examination of a prisoner before the magistrate previous to his committal, purports to have been taken on oath. Evidence upon the trial of the prisoner for felony is not admissible, to shew that in fact the examination was not on oath.

THIS was an indictment for sacrilege alleged to have been committed in *Sheffield* church.

The prosecutors tendered in evidence the examination of *Hornage* before the magistrate previous to his commitment. This was written under the following words, which except as to the name were printed "The examination of — *Hornage*, "taken on oath before me, &c." and was undersigned by the magistrate.

Upon the objection being taken, the examination was rejected, because it purported to have been taken on oath, and *Le Blanc J.* would not permit a witness to be examined for the purpose of shewing that no oath had in fact been administered to the

the prisoner, saying that he could not allow that which had been sent in under the hand of a magistrate to be disputed.

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HORNAGE.

Maude and Hardy for the crown.

Williams for the prisoners.

The KING v. BARNES.

THIS was an indictment against the prisoner, a bankrupt, for secreting his effects under the statute 5 G. 2. c. 30. s. 1.

The indictment in the first count alleged the petitioning creditors debt to have been due to A. B., C. D., and E. F. surviving executors of the last will and testament of G. H. who was the grandfather of the prisoner.

In the last count it was laid to be due to the same persons generally.

Although the probate of a will has been produced, the will itself cannot be read in evidence upon the mere production of it by the officer of the Ecclesiastical Court, without some indorsement upon it for the purpose of authentication.

In an indictment against a bankrupt, the petitioning creditor's debt is alleged to be due to A., B., and C., surviving executors of the last will and testament of D., after proof that A., B., and C. were the executors and were directed by the will to carry on the business, it is necessary to prove that they all assented to act in discharge of the trust. — And a general admission by the prisoner of a debt, due to the executors of D. will not supply the defect.

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In order to substantiate these allegations, the prosecutors proved that the petitioning creditors were the executors of *G. H.* a ship-builder, by the production of the probate, and in order to shew that the testator had directed that his business should be carried on by the executors, for the benefit of his estate, they tendered in evidence the will itself, produced by the officer of the ecclesiastical Court, which, without further authentication, they proposed to read.

LE BLANC J. — The only ground on which the probate is received in evidence is, that it is authenticated by the seal of the Court; but here you merely produce the will without any authentication upon it. I think it is not evidence without some indorsement upon it, for the purpose of authentication.

The prosecutors afterwards proved, that the business had been carried on and the debt contracted by the prisoner subsequent to the death of the testator, and they also proved an acknowledgment by the prisoner that he was indebted in a sum exceeding 100*l.* to the executors of his grandfather, for work done for him, but there was no proof that *E. F.* the third executor had ever acted in the management of the business, though the two others had.

For the prisoner, it was objected, that it was incumbent on the prosecutors to shew that all three

petitioning creditors had assented to the carrying on the business under the directions of the will, since in the absence of evidence to that effect, it was not to be presumed that they would incur the responsibility attending the execution of such a trust.

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On the part of the prosecution, it was answered that the objection had at all events been removed by the prisoner's admission of a debt due from him to his grandfather's executors. That in the last count of the indictment, the debt was alleged to be due to the petitioning creditors generally, and since it had been proved that they were the executors of *G. H.* the admission proved the debt to be due to them.

LE BLANC J. was of opinion that it was not to be presumed that the three petitioning creditors had assented to carry on the business as trustees under the will, and that the defect in evidence was not supplied by the prisoner's admission, since by that he might mean that he was indebted to two of them, and that under the circumstances it would be going too far to infer that he meant to include all three.

The jury were then directed to acquit the prisoner, which they did accordingly.

Hullock, Littledale, and Tindal for the prosecution.

Sinclair, Richardson, Williams, and Starkie for the prisoner.

[Attornies, and Russel, Bourne & Co.]

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The KING v. DYSON.

In order to bring an offender within the clause of the st. 43 G. 3. c. 58. s. 1. for stabbing with intent to resist a lawful apprehension by a private person, for cutting a third person, it is essential that the person apprehending should have been present at the commission of the offence, or that he should be armed with the authority of a warrant.

THIS was an indictment against the prisoner under the stat. 43 G. 3. c. 58. s. 1. for stabbing another, with intent to resist a lawful apprehension.

It appeared from the statement of *Williams* for the prosecution, that the prisoner having previously cut a person on the cheek, several others who were not present when the transaction took place, went to his house to apprehend him, without any warrant, and that upon their attempting to take him into custody, he inflicted the wound upon which the indictment was founded.

LE BLANC J. was of opinion upon this statement, that the prosecution could not be sustained; he said, to constitute an offence within this branch of the statute, there must be a resistance to a person having a lawful authority to apprehend the prisoner, in order to which, the party must either be present when the offence is committed, or he must be armed with a warrant. This branch of the statute was intended to protect officers and others armed with authority, in the apprehension of persons guilty of robberies or other felonies.

The prisoner was accordingly acquitted.

DICAS v. HIDES.

1816.

THIS was an action on the case against the defendant, a common innkeeper, for refusing to supply the plaintiff with post-horses.

An innkeeper though licensed to let post-horses, is not liable to an action for refusing to supply them for a guest.

The declaration contained two counts; in the first it was alleged, that the defendant being an inn-keeper at *Hulton Four Lane-ends*, and licensed to let post-horses, having received the plaintiff into his house as a guest, and having horses and a chaise at liberty, refused to supply the plaintiff with a chaise and horses to enable him to pursue his journey, although a reasonable sum had been tendered him, &c. The second count alleged that the defendant being a common innkeeper, and licensed to let post-horses, refused to supply the plaintiff. — Plea, the General Issue.

The plaintiff having given evidence which supported the allegations in the declaration;

It was objected on behalf of the defendant, that the action was not maintainable; the common law did not impose on innkeepers such an obligation as was contended for, and the mere circumstance of taking out a licence to let post-horses, could not create such a liability, but left it optional with the innkeeper, either to let his horses to the traveller, or to refuse them.

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For the plaintiff, it was contended, that the defendant, by having taken out a licence, had rendered himself liable to fulfil the objects of the licence, and that persons in the situation of the defendant, having undertaken (to the exclusion of others) to supply the public with post-horses, ought not to be allowed to exercise their privilege in a partial or capricious manner, by serving one traveller, and rejecting another. They had undertaken a public duty, and public convenience required that it should be fairly performed.

LE BLANC J. when the plaintiff had closed his case, inquired whether the defendant's liability was alleged in the declaration to be founded on any general custom of the realm ; and having been answered in the negative, expressed himself to be decidedly of opinion, that the action was not maintainable, but recommended that the jury should find a special verdict for the plaintiff, with nominal damages, in order that the question might be more fully considered.

But the defendant's counsel stating that they had a full answer to the evidence adduced by the plaintiff, proceeded to call witnesses, and upon the whole of the case, the jury found a

Verdict for the defendant.

Scarlett and Cottingham for the plaintiff.

Raine and Cross for the defendant.

[Attornies, *Smith and Foulkes.*]

FARNWORTH and Another, Assignees of KIRTON,
a Bankrupt, v. PACKWOOD.

1816.

THIS was an action on the case against the defendant, a common innkeeper, for negligence in consequence of which the goods of the plaintiff whilst he was a guest in his house had been lost.

If a guest at an inn deposit his goods in a room which he uses as a warehouse, and of which he has the *exclusive possession*, the innkeeper is not liable for the loss.

The declaration also contained a count in trover. Plea, the General Issue.

In the early part of *January* 1813, *Kirton* came to the defendant's house in *Birmingham*, and in the course of three or four days afterwards applied to the defendant for a private room for the purpose of depositing goods there, and exposing them for sale; and the defendant having shewn him a small room, which he approved of, *Kirton* the next day took possession of it, and the key was delivered to him, and was kept by him exclusively for several days; but, upon the defendant's wife requesting to place some parcels in the same room, *Kirton* permitted her to use the key, and he had not the exclusive use of it, and other parcels were deposited in the room. *Kirton* boarded and lodged in the house for almost a fortnight, and from time to time introduced his customers into the room. A short time before he left the house he discovered that a package was missing, which made the subject of the present demand.

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The defendant's counsel admitted, that in general an innkeeper was answerable for the safe custody of the goods belonging to a guest in his house, but contended, that in the present instance the party having applied for the use of the room, not as a guest, but in order to exhibit his goods, had discharged the defendant from his common law responsibility. Witnesses were then called to prove that the room had been, during the whole time, exclusively in *Kirton's* possession.

LE BLANC, J.—If a guest take upon himself the exclusive charge of the goods which he brings into the house of an innkeeper, he cannot afterwards charge the innkeeper with the loss. The only question in this case is, whether *Kirton* did not take upon himself the exclusive charge of his goods to the exclusion of every other person? A landlord is not bound to furnish a shop to every guest who comes into his house; and if a guest takes exclusive possession of a room which he uses as a warehouse or shop, he discharges the landlord from his common law liability. The question, therefore, for your consideration, is, whether, when the goods were lost, they were exclusively in *Kirton's* possession? It is admitted, that during part of the time *Kirton* kept the key, if afterwards the defendant took the key from him, the goods then ceased to be under his exclusive controul, and the defendant became liable for their safe custody. The only question is whether, at the time of the loss, the goods were in the exclusive possession of *Kirton*?

Verdict for the defendant.

Scarlett

Scarlett and Richardson for the plaintiff.*Raine and Littledale* for the defendant.[Attornies, *Gaskell and Chater.*]

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The question of the liability of an inn-keeper was much discussed in the Court of King's Bench, in *Trinity* term 1815, in the case of *Burgess v. Clements* which had been tried before *Richards*, Baron, at the *Oxford Spring* assizes 1815, the facts were these; the plaintiff had been in the habit of frequenting the defendant's house, there was a common traveller's room; but the plaintiff on this occasion wished to have a private room to exhibit his goods and for the purpose of receiving customers, and asked for a particular room up stairs. The landlady shewed him a private room which opened into the gateway, and the windows of which could be looked into from the street, she gave him the key of the room to lock it when he went out, and advised him to bolt the door. The loss happened at night; the plaintiff had a candle in his room, but the curtains of the windows were down. When the defendant's son left him, he was packing up his goods, he had been out two hours before the loss was discovered, when he went out he was not sure that he had even shut the door after him, the key was found in it; the defendant went into the room after the plaintiff went out, and put out the candle which he had left burning.

The learned Judge informed the jury that the inn-keeper was *prima facie* liable for the goods of his guest, but that the guest by his own conduct might discharge him from that liability, and left it to them to say whether the plaintiff had not by his careless and negligent conduct, after he had obtained possession of the room, discharged the defendant from his common law responsibility.

The jury found for the defendant.

A rule *nisi* having been granted for a new trial, *Jervis and Manley* for the plaintiff relied on *Calye's* case, 8 Coke, 65. Moor, 78. pl. 207. 22 Hen. 6. 21. b. 11 Hen. 4. 45. a. b. 42 Ed. 3. Il. a. 5 Mod. 543. 1 Roll. Ab. 4. 10 Hen. 7. 26. 2 Cro. 189. Dyer, 158. *Spencer v. Spencer*, *ib.* 266. *Bennett v. Mellon*, 5 T. R. 273. *Dauncey and Taunton* for the defendant, cited *Calye's* case, 8 Co. resolution, 4. *The East India Company v. Pullen*, 2 Str. 690. Com. Dig. action, against a common carrier, C. 1. Cro. Eliz. 285. Salk. 18.

LORD ELLENBOROUGH. — I cannot see any thing to impeach the propriety of this verdict. The question here is, whether the jury in the exercise of their province, have rightly exercised that province. An inn-keeper is bound to keep

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keep the goods of his guest who comes for the purpose, *hospitandi*, so that no loss *eveniat pro defectu hospitatoris*. I do not mean to say that where goods are stolen, it is not *primâ facie* evidence of defect of care on the part of the landlord; but under circumstances no doubt, the inn-keeper may be exempt from liability, where the conduct of the guest is not only concurring with, but inducing to the loss. As in *Calve's* case if he himself bring a person with him to the inn who steals his property, the innkeeper is not liable; for by that means he himself induces the theft. The questions in this case therefore are, 1st, does this man come to the defendant's inn for the general purpose *animo hospitandi*; and adly, whether his own conduct has not conduced to the loss. It is not stated that he wanted a room for lodging; for, according to the evidence, he comes to the landlady and asks for a light room in a particular situation of the house to shew his goods. The innkeeper is not bound to furnish persons with exhibit rooms, for the purpose of displaying and exhibiting their goods, to deal with them as a shop. The innkeeper is not bound to find shops, but he is bound only to find lodging rooms, and lodging conveniences. I agree in what is stated in *Calve's* case, that the mere delivery of the key of a room will not dispense with the care and attention due from the landlord, and that he cannot exonerate himself by merely handing a key over to his guest; but if the guest take the key, it is a very proper question for the jury, whether he takes it *animo custodiendi*, and for the pur-

pose of exempting the landlord from his liability. The case itself clearly shews, that the custody must be his own custody, so as to exempt the landlord from responsibility. He does not want a *lodging*, but a *shop* to exhibit his goods, he is accordingly furnished with such a room, he receives the key and he deposits his goods there as a warehouse. Lord *Coke* lays it down in that very case, that if the guest's servant, companion, or follower, rob him, the landlord is not liable; and in this case the plaintiff called strangers together for the purpose of a show, and invites the admission of strangers into the room, and upon whose approach and access the landlord has no check. This is clear evidence of an user of the inn for purposes quite *aliene* from those *hospitandi*; and it seems hardly to come within the limits of that liability for which the innkeeper is responsible. It would be hard indeed, to make the innkeeper liable for property in a room used for such purposes. It appears in evidence, that the plaintiff is told that people can look into his room and see what is going forward, and he is desired to bolt his doors, for there are strangers about. After this suspicion had been communicated to him he was bound to use diligence in protecting his own property. Under the circumstances of this case, it appears to me that this is not a room found him for the ordinary purposes of accommodation in an inn, and for the loss of property for which the landlord is liable. The plaintiff has not performed his own duty in taking care of his property, after admonition given to him for that

that purpose by the defendant, and it appears to me therefore, that this verdict ought to stand.

LE BLANC, J. — I agree that there is no ground for a new trial. There is no doubt that the innkeeper is liable for goods coming to his custody, unless there is some special circumstance to take him out of that liability. This case differs from *Calve's* case, for there it was the case of a lodging room; and the party shall not exempt himself from liability in such a case, even though he gives the traveller a key to lock his room. But here the room is not for the purpose of sleeping, but for a purpose for which an innkeeper is not bound to accommodate his customers, and therefore he is not liable for a loss out of that room.

BAILEY, J. — I also agree that the verdict is right. It seems to me that the plaintiff's accepting the key of the room, superseded the liability of the landlord to take care of his goods. The plaintiff applied for a room, not as a room of custody, but for the purpose of exhibiting his goods in the character of a dealer in jewelry and articles of that kind. The landlady might refuse such a room, or she might prescribe the terms upon which she would let him have it; and he accepted the room upon the terms. She says, "this is a particular room, there is the key of that room; you must lock that room." He accepted those terms, and therefore he relieved

her from responsibility. But if he had said, "this shall not discharge your liability, look you still to that," the defendant would have replied, "then you shall not have the room." The defendant had a right to refuse the room for the purpose in question, or to concede it upon any terms she chose. I think she did so upon the terms of the plaintiff's taking the custody of his goods into his own hands with the key of the room; and that he accepted the key on those terms. I hold, under such circumstances, that the owner of the inn is not liable; for if we were to hold otherwise, it would be to make the innkeeper liable for the default of the plaintiff. He did not make a communication to the defendant when he left the room, that her responsibility might revive. It appears to me, therefore, that this verdict ought not to be disturbed.

DAMPIER, J. — Upon the facts and the law that have been distinctly laid down to the jury, I have no doubt that this verdict is right, I think it is the only proper conclusion the jury could have drawn, the only doubt with me was, whether the law had not been left to the jury, and not distinctly laid down by the learned Judge. It appears now, however, that there is now no doubt upon that point. To grant a new trial would only put the parties to useless expence for the verdict would certainly be the same.

Rule discharged.

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HENTY v. STANIFORTH. (a)

A voyage from *Riga* to *Hull* is commenced before a licence has been obtained, which is necessary to legalize the voyage, but under a reasonable expectation that a licence has been obtained; an insurance having been effected here by an agent in *England*, after a licence had been obtained, the assured is entitled to a return of premium.

THIS was an action on a policy on goods in a *Swedish* ship from *Riga* to *Hull*.

The charter party, which was dated the 28th of *August*, contained a stipulation to procure a licence for the voyage. The interest was averred to be in Messrs. *Bourmans* of *Riga*. On the 3d of *September* the order was sent by *Bourman & Co.* to the plaintiff, their agent here, to effect the insurance, and to procure a licence for the voyage. The goods were put on board on the 20th of *September*, and the ship sailed on the 3d of *October*. The letter by which the plaintiff was requested to procure a licence arrived on the 5th of *October*, and the licence was in fact procured on the 7th. The policy was effected on the 20th of *November*.

It was objected for the defendant, that the plaintiff could not recover for an average loss, since the voyage (which was illegal in its commencement), could not be legalized by a subsequent licence, as had been decided in the case of *Cowie v. Barber*, and that upon the same authority and also that of *Lubbock v. Potts*, 7 East, 449. the plaintiff was not entitled to a return of premium.

(a) This case was tried at *Guildhall* at the sittings after *Michaelmas* term, 1815.

The

The *Attorney-General*, for the plaintiff, contended, that the plaintiff was at all events entitled to a return of premium, and he distinguished the present case from those cited, on the ground that in those an illegal voyage was contemplated, but that in the present the party insured intended the voyage to be legal, since, according to the regular course, the letter authorizing the insurance and directing the application for a licence ought to have arrived a fortnight earlier, and it was not known at the time when the insurance was effected that the ship had sailed before the licence had been obtained.

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LORD ELLENBOROUGH, after declaring his opinion that the plaintiff was not entitled to recover for the loss, said, with respect to the return of the premium, since the insurance was effected in the full intention of effecting a legal insurance, in respect of a voyage which the party believed to be legal, I am of opinion that he is entitled to recover the premium.

Verdict for the plaintiff accordingly.

The *Attorney-General* and *Pollock* for the plaintiff.

Parke and *Gaselee* for the defendant.

A rule *Nisi* for a new trial was granted in the ensuing term, and after the question as to the return of premium had been argued, Lord *Ellenbo-*

1816. *rough* in the Easter Term following delivered the
HENTY judgment of the court to the following effect :

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We are of opinion, that the plaintiff is entitled to recover the premium on the authority of *Owen v. Bruce*, 12 East, 225. The objection is, that the plaintiff is a *particeps criminis*, but the licence had been granted before the policy was effected, although not before the ship had sailed. No risk was sustained by the underwriter, and therefore if he could retain the premium he would retain it without any consideration. It was always intended that a licence should be procured ; the letter for that purpose was sent on the 3d of *September*, and it was probable that it would have been received before the 3d of *October*, on which day the ship sailed. The plaintiff contemplated a legal not an illegal voyage, and so did the agent in *England*, and the illegality depended on a fact which took place contrary to the reasonable expectation of the parties. The case is plainly distinguishable from that of *Toulmin v. Anderson*, 1 Taunt. 227. there no question was made as to the return of premium ; and in all the other cases cited in argument an illegal voyage was contemplated, but here, if the expectations of the plaintiff had been realized, the voyage would have been legal ; we think, therefore, that the plaintiff was not a *particeps criminis*, and that the rule must be discharged.

[Attornies, *Weston & Co.* and *Trower & Co.*]

 GUILDHALL.

Second Sitzings in Easter Term,

56 GEORGE III.

GRONING and Another v. MENDHAM. (a)

1816.

May 15.

ASSUMPSIT for the price of a quantity of clover-seed bought by the plaintiffs, merchants at *Hamburgh*, by the order of defendant, a merchant in *London*.

In an action for the price of clover-seed sold by sample, the defendant contends that the seed delivered did not accord with the sample; before he can go into such a defence, he must prove that he gave notice of his objection to the plaintiff.

The seeds were objected to by defendant as of an inferior quality—the order proved was for *seed of the finest quality*. The plaintiffs' case being closed, Lord *Ellenborough* called upon the defendant's counsel to prove that he had offered to return the seed upon discovery of its inferiority, before he would receive evidence that it did not answer the order.

Gurney, for the defendant, stated, that such offer had been made to one of the plaintiffs, resident in *London*, who requested that the seed might be sold by the defendant without prejudice,—that being the best thing to be done at all events, the

(a) I am indebted to a friend for this note.

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market being on the decline and the season far advanced, but that as this arrangement was agreed upon at plaintiffs' counting-house, in *London*, he could only prove it by a clerk of plaintiffs.

A letter from one of the plaintiffs (*Groning*) was given in evidence, dated soon after the arrival of the seed, in which he says, "*he would get his corn-factor to inspect the seed and confer further upon that subject.*" The plaintiffs' clerk was then called, but was evidently an unwilling witness; all that could be got from him was, that he had heard from *Groning* "*that defendant had objected to the quality of the seed.*" Another clerk of the plaintiffs, on cross-examination, admitted the same fact.

It was then contended for the defendant, that it ought to be left to the jury to infer from the circumstances of the case, the letter of *Groning*, and the evidence of the clerk, taking his situation and manner of giving his testimony into view, that the defendant had rejected the seed.

But Lord ELLENBOROUGH thought the evidence not sufficient to go to the jury, and directed them that there was no proof of any agreement to sell without prejudice. Whereupon they found a

Verdict for plaintiffs.

Garrow A. G. Topping, and Richardson for the plaintiffs.

Gurney, Curwood, and Ross for the defendant.

[*Attornies, Kaye & Freshford and Bicke & Evans.*]

CASES

ARGUED AND DECIDED

AT

NISI PRIUS

IN K. B.

At the Third Sittings in Easter Term,

56 GEORGE III.

SITTINGS AT GUILDHALL.

COLLENRIDGE v. FARQUHARSON.

1816.

May 18.

ASSUMPSIT by the plaintiff, as the indorsee, against the defendant, as the indorser of a bill of exchange.

It appeared, upon the cross-examination of the plaintiff's witnesses, that the defendant had deposited the bill in question with a person of the name of *Powell* (through whose indorsement the plaintiff derived his title), as a collateral security for the payment of another bill, and that it was in the hands of *Powell* when it became due.

A. the holder of a bill deposits it with B. as a collateral security, for the balance of accounts between them; B. indorses the bill over to C. after it becomes due. In an action by C. against A., B.'s account book is not evidence

in diminution of the balance between A. and B. — But *semble* a contemporaneous entry or declaration by B. would be admissible.

And (*semble*) C. is not entitled to recover from A. a sum exceeding the lowest amount of the balance, subsequent to the transfer to B.

The

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COLLEN-
RIDGE
v.
FARQUHAR-
SON.

The plaintiff having proved a *prima facie* case, *Marryatt*, for the defendant, proposed to give in evidence the state of the accounts between *Farquharson* and *Powell*, since the deposit of the bill with him as a security, contending that the plaintiff was not entitled to recover more than the lowest sum to which the account had been reduced between *Powell* and *Farquharson*, at any time subsequent to the deposit. For this purpose he called one of the plaintiff's witnesses, who had on his original examination produced *Powell's* book of accounts (of which no use had been made), and required him to state from the book what was the amount of the balance between *Powell* and *Farquharson* when it was the lowest.

The *Attorney-General*, for the plaintiff, objected to this evidence; it would be converting the court into a court of equity to allow such accounts to be examined into for the purpose of discovering some ground of defence; besides *Powell's* books were the mere memoranda of a third person, which were not binding on the plaintiff, and he ought to have been called and examined in person as to any fact within his knowledge, in order to give the plaintiff the benefit of cross-examination; at all events he ought to have been served with a *subpoena duces tecum*, to produce the book, since without one the witness was not bound to produce it.

Marryatt, on the other hand, contended, that since *Powell* was the holder when the bill became due,

due, that which would have been evidence against him would be evidence against any one who claimed under him; if, for instance, he had given a receipt for the amount, that would have been evidence against the plaintiff to shew that the bill had been paid, the defendant had a right to the production of every document actually in court.

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RIDGE
v.
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SON.

LORD ELLENBOROUGH was of opinion, that any entry by *Powell* made at the time and accompanying his act would have been evidence in whatsoever book it had been made; but that an entry or declaration of his which did not accompany the act was not admissible, it might have been made for the very purpose of being used in evidence.

The evidence was accordingly rejected.

Verdict for the plaintiff.

Garrow, A. G. and *Gurney* for the plaintiff.

Marryatt for the defendant.

[Attornies, *Willis & Co.* and *Gudc.*]

SITTINGS AT WESTMINSTER.

1816.

May 28.

DOE on the demise of PITCHER v. ANDERSON and
ROBINSON.

A title having been proved in A. who continues in possession from 1809 to 1814, and from whom the lessor of the plaintiff in ejectment derives title in 1815, it is not sufficient for the defendant to prove a bare possession by himself during the year 1814.

A creditor who along with others has become a party to a deed of trust, by which in consideration of the assign-

ment of certain debts due to their debtor for their benefit they release their debts, is not precluded from suing out a commission of bankrupt against the debtor on its being discovered that he had previous to the execution of the deed committed a secret act of bankruptcy.

EJECTMENT to recover the possession of two houses.

For the lessor of the plaintiff it was proved that on the 29th of *June* 1815, the interest in the houses had been assigned to *Pitcher* by the sheriff under an execution against *Strube* who claimed under a lease from *Rogers* in 1809, for sixty-two years.

It also appeared that *Strube* had been in possession from 1809 to 1814, during which time he had paid rent to *Halford*, the ground landlord, but that during the year 1814, and up to the time of the assignment by the sheriff, *Halford* had received the rent from *Anderson*.

The *Attorney-General* for the defendant, contended, that upon this evidence the plaintiff ought

to

to be nonsuited, since the lessor of the plaintiff claimed under *Strube* by virtue of the assignment in 1815, he could have no better title than *Strube* had at the time of the assignment, and that he had then no title, since *Anderson* had been in possession for the whole of the year 1814, which amounted to *prima facie* evidence of a seisin in fee.

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 DOR
 Demise of
 PITCHER
 v.
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 and Another.

Jervis and *Peake* for the plaintiff: possession is merely *prima facie* evidence of title capable of being rebutted, and here the presumption which might otherwise result from *Anderson's* possession is rebutted by the proof given of the antecedent title proved in *Strube*, and it lies upon the lessor of the plaintiff to shew that his interest has since determined.

Lord ELLENBOROUGH was of opinion, that the defendants ought to go into their defence, the title had been proved to be in *Strube* up to a particular time, and *Anderson's* subsequent possession was not inconsistent with *Strube's* title.

The defendants relied in the first instance on an assignment of the houses by way of mortgage, executed in 1813, by *Strube*, to a person of the name of *Millet*, but it turned out that this transaction was merely colourable and fraudulent. They then relied on an assignment to *Anderson* by the assignees, under a commission of bankruptcy, which had been issued against *Strube*, bearing date January the 20th 1814, on the petition of *Burgess*.

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 {
 DOR
 Demise of
 PITCHER
 v.
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 and Another.

They then proved an act of bankruptcy to have been committed in *October* 1813, and in order to prove the petitioning creditors' debt, gave in evidence two promissory notes, dated *September* 15, 1813, made by *Strube* in favour of *Burgess*, the one for 30*l.*, and the other for 100*l.* both payable six months after date; they also proved admissions on the part of *Strube* of a debt to *Burgess* of 112*l.*, but it afterwards turned out that these admissions had been made after the commission of the act of bankruptcy by *Strube*.

To encounter this evidence as far as respected the petitioning creditors' debt, the lessor of the plaintiff gave in evidence, a deed of trust executed by *Strube*, *Burgess* and several of *Strube's* creditors, by which *Strube* assigned certain property for the benefit of his creditors, and containing also a general release on the part of *Burgess* and the other creditors. In this deed the sum of 113*l.* 15*s.* was stated as the debt due from *Strube* to *Burgess*, his debt having been reduced to that sum by a payment at that time of 2*s.* 6*d.* in the pound.

LORD ELLENBOROUGH. — Since this deed was executed after the act of bankruptcy, it cannot operate so as to release the debt; the consideration for the release entirely fails. The release was granted on condition that *Strube* should assign to his creditors property for their benefit, which, being then a bankrupt, he was not competent to do.

Jervis

Jervis and *Peake* then contended, that since *Burgess* was a party to the deed, he was disqualified from afterwards suing out a commission of bankruptcy against *Strube*, and that being a party to the deed, he could not defeat it, before some third party had intervened; and they cited the case of *Tappendall* and Others v. *Burgess*, 4 East, 230.

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DOE
Demise of
PITCHER
v.
ANDERSON
and Another.

LORD ELLENBOROUGH. — How can he be disqualified as a petitioning creditor, when he has received no benefit from the deed. I admit the law as laid down in *Tappendall* v. *Burgess*, and if the deed had been relied on as an act of bankruptcy, I should have said that *Burgess* was not a good petitioning creditor, but they do not rely on the deed as an act of bankruptcy.

Jervis then attempted by evidence to reduce the debt below the sum of 100*l.* but failing in this, the plaintiff was

Nonsuited.

Jervis and *Peake* for the plaintiff.

The *Attorney-General*, *Topping*, and *Gurney* for the defendants.

[Attornies, *Pitcher* and *Rogers*.]

In the ensuing term, *Peake* moved for a rule to shew cause why the nonsuit should not be set aside, on the ground that *Burgess* (after having derived
VOL. I. T advantage

1816. { advantage from the deed of composition,) could not, before any other creditor had interfered, sue out a commission against *Strube*, and he cited the cases of *Bamford v. Baron*, 2 T. R. 594. n. and *Tappendall v. Burgess*, 4 East, 230. and he urged, that after signing the composition deed, it was fraudulent in *Burgess* to take out the commission, but he allowed (in answer to a question put by Mr. J. Bayley) that *Burgess* at the time when the deed was executed, did not know that *Strube* had committed an act of bankruptcy.

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Demise of
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and Another.

LORD ELLENBOROUGH. — Having taken a bad security, of which he could not avail himself on account of the antecedent act of bankruptcy, why was he to remain content with his bad title, when he might have a good one, and receive a more solid satisfaction under a commission. In the cases cited, the parties had concurred in the deed which they could not afterwards repudiate or treat as an act of bankruptcy.

BAYLEY J. — The fraud was on the part of *Strube*, who executed the deed after an act of bankruptcy.

ABBOTT J. — Since *Burgess* was ignorant at the time the deed was executed, of the previous act of bankruptcy, I think he was not bound afterwards to rely upon it.

HOLROYD

HOLROYD J. — *Strube* having committed a previous act of bankruptcy, the consideration failed, and therefore the release which was founded upon that consideration also failed.

Rule refused.

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DOE
Deceased of
PITCHER
v.
ANDERSON
and Another.

JEFFERY v. WALTON.

Same day.

ASSUMPSIT for not taking proper care of a gelding, let by the plaintiff to the defendant, and to recover twelve guineas, as the stipulated hire of the gelding for twelve weeks.

At the time of hiring an horse a note of the agreement is made, stating the time and the price, the plaintiff is not precluded from proving by parol evidence additional terms of agreement.

It appeared by the evidence of two witnesses called by the plaintiff, that a son of the defendant having applied to the plaintiff, (who was a dealer in horses, and also let horses to hire,) for the loan of a horse; the latter told him that he had no horses at home, except such as were for sale, but said that he had a black horse who *shied*, and that if he took him on hire, he must be liable for all accidents.

The defendant's son engaged him on these terms at the rate of two guineas a week, for six weeks at least. It also appeared, that whilst the horse was in the defendant's possession, in consequence of *shying*, he came down upon the road, and suf-

fered

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JEFFERY

WALTON.

ferred a material injury, in having a fetlock severely cut by a glass bottle.

Upon the cross-examination of the plaintiff's witnesses, it appeared that after the agreement had been made, some memorandum had been entered in pencil upon a card which the plaintiff had kept.

Walton for the defendant, contended, that it was incumbent on the plaintiff to produce this.

Scarlett for the plaintiff, did not object to produce it, but contended that it was to be considered as part of the defendant's evidence.

LORD ELLENBOROUGH. — No, it is part of your case if it contains a memorandum of the contract, the only question is, whether it contains the contract; if that had clearly appeared in evidence, I should have shut out the parol evidence long ago.

The card was then produced, on which was written the following memorandum:

“ Six weeks at two guineas, *William Walton*,
“ junior.”

Walton for the defendant, then contended, that this was to be considered as the real contract between the parties, having been made according to the evidence, immediately upon the close of the agreement, and that it was not competent to the
plaintiff

plaintiff to engraft upon it a further term by means of parol evidence. And consequently that this was nothing more than an ordinary case of hiring in which accidents of this nature were to be borne by the person who let the horse.

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JEFFERY
v.
WALTON.

Lord ELLENBOROUGH. — The written agreement merely regulates the time of hiring and the rate of payment, and I shall not allow any evidence to be given by the plaintiff in contradiction of these terms, but I am of opinion, that it is competent to the plaintiff to give in evidence supplementary matter, as part of the agreement.

Verdict for the plaintiff, damages 50*l.* (a)

Scarlett and *Marryatt* for the plaintiff.

The *Attorney-General*, *Walton*, and *Gurney* for the defendant.

[*Attornies, Vincent and Walton.*]

(a) Twelve guineas had been paid into court for the hire of the horse.

1816.

Same day.

BARBER v. FOX.

A. having commenced certain business for B. which he has undertaken, refuses to proceed without a promise from C. to pay the further expences, C. is not liable on such a promise without a note in writing.

ASSUMPSIT to recover the amount of the plaintiff's bill, for business done by him as an attorney for the defendant.

Two actions having been brought against *Samuel Fox* in the *King's Bench*, and one in the *Exchequer*, in which *William Bailey Fox* (the defendant) and *Thomas Fox* were bail above; *Samuel Fox* was desirous of being surrendered in discharge of his bail, in order that he might take the benefit of an insolvent act; *Cock* the clerk of the plaintiff transacted the business of the render of *Samuel*, and 10*l.* had been paid to him by the latter, towards the expences of such render; after the render in the *Exchequer* a *habeas corpus* was issued, in order to render *Samuel Fox* in the *King's Bench*; *Cock* then said the money which I have received is almost exhausted, I must have some more or I cannot go on; the defendant then said, he knew how serious the business was, and that if *Cock* would proceed, he would pay him whatever was to be paid.

Under these circumstances, it was contended (on the part of the plaintiff,) that the defendant had made himself liable for the subsequent expences attending the completion of the surrenders, that

business having been done at his request, and upon his undertaking.

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BARBER

v.

FOX.

LORD ELLENBOROUGH. — The plaintiff must be called, the business was doing for the render of another person from whom the plaintiff had received the sum of 10*l*. and the very bill which has been delivered is made out as for the business of another, namely, *Samuel Fox*, in the surrendering of whom the plaintiff was employed. Therefore this was the business of another who was about to take the benefit of an insolvent act; then the conversation takes place, in which the defendant undertakes to pay the further expences. But the statute says that a person shall not be bound by a promise to pay the debt of another without some note in writing. This was the inchoate business and debt of another, and if the defendant had promised in writing, he would have made himself liable; without a promise in writing he is not liable.

The *Attorney-General* and *Puller* for the plaintiff.

Comyn for the defendant.

[Attornies, *Barber* and *Watson*.]

COURT OF COMMON PLEAS.

SITTINGS AT GUILDHALL.

1816.

May 29.

WALAND v. ELKINS.

A. and B. are jointly interested in the profits of a common stage waggon, but by a private agreement between themselves each undertakes the conducting and management of the waggon, with his own driver and horses, for specified distances; they are notwithstanding this private agreement jointly responsible to

THIS was an action on the case to recover damages for the breaking of the plaintiff's windows, in consequence of negligence on the part of the driver of the defendant's waggon, by means of which a cart had been forced against the plaintiff's house.

The first count of the declaration alleged, that the defendant was in possession of a waggon and divers, *viz.* eight horses, which were then and there under the guidance and direction of a servant of the said defendant, &c.

The second count alleged, that the defendant being in possession of another waggon and eight other horses, allowed the same to be conducted by a person incompetent to conduct the same.

third persons for the negligence of their drivers throughout the whole distance.

And an averment that the negligence was occasioned by the driver of A. against whom alone the action is brought, is supported (in such case) by proof that the driver was actually employed by B. in conducting the waggon, for his own stages.

It appeared that the defendant and one *Dyson* were carriers from *London* to *Gosport*, and that by an arrangement between them *Dyson* horsed the waggon from *London* to *Farnham*, and the defendant then conducted it from *Farnham* to *Gosport*, and that at the time the mischief happened the waggon was drawn by *Dyson's* horses, and was driven by a servant of *Dyson's*, who had been hired by and received wages from *Dyson*, and with whose employment the defendant had no concern whatsoever, but that the waggon itself was the property of the defendant.

1816.

WALAND
v.
ELKINS.

Best Serjt. for the defendant, submitted, that under these circumstances the plaintiff could not recover; *Dyson* horsed the waggon for the stage, in the course of which the accident happened, and employed the waggoner, over whom the defendant had no controul; and that the mere circumstance of his being the owner of the waggon no more made him responsible than a person would be if he lent a chaise to another, who, in using it, did damage to a third person.—But that, at all events, the plaintiff could not recover under a declaration framed like the one in question, since, in the first count, he had alleged that the waggon was driven by a servant of the defendant's; and in both the first and second counts he had alleged, that the horses were the property of the defendant, which had been contradicted by the evidence.

GIBBS,

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WALAND

v.

ELKINS.

GIBBS, C. J.—I am of opinion, that the action may be maintained upon this principle: the waggon belongs to *Elkins*, and he receives the profits derived from the use of it; on what terms he engages with *Dyson* we do not know, but being jointly entitled with *Dyson*, and since it is no objection that *Dyson* has not been joined, the case is the same as if *Elkins* had received all the profits. Then since the waggon was to be drawn for the benefit of *Elkins*, the servant to all legal purposes was the servant of *Elkins*, although for inferior purposes; and as between the parties he may be considered as the servant of *Dyson*, the objection however which has been made is a fair one, and I regret that a question of so much importance has arisen in so trifling a cause.

Best Serjt. referred to the case of *Barton v. Hanson*, 2 Taunt. 49. in which it had been held, that for corn supplied for the use of the horses of a stage-coach belonging to several proprietors, but horsed severally for specific stages, that proprietor alone was liable who supplied the horses by which the corn had been used.

GIBBS, C. J.—I recollect the case very well, but the decision there turned upon the inferior contract (if I may so term it) between the parties. In that case there was a particular contract between the parties, and it was known in what situation they stood with respect to each other. Such contracts

tracts are binding upon the parties, but they make no difference in their relation to the public.

Verdict for the plaintiff, damages 3*l.* 8*s.*

1816.

WALAND
v.
ELKINS.

Pell Serjt. and *Espinasse* for the plaintiff.

Best Serjt. for the defendant.

[Attornies, *Robinson & Hine* and *Dyne & Son.*]

ROBSON v. GODFREY and Another.

THIS was an action to recover for the amount of repairs done to a vessel of which the defendants were the owners.

The plaintiffs had declared upon the common counts for work and labour done, and materials found. It appeared in evidence, that a special agreement had been entered into for repairing the vessel, according to an estimate which had been made, according to which the plaintiff was to be paid certain sums at specified periods, viz. 100*l.* at the end of a fortnight; the like sum at the end of four weeks; the like sum at the end of six weeks; and the remaining sum of 320*l.* by an approved bill at six months, with interest. The six months had

Work is to be done according to a special agreement between the parties, regulating the quantity, price, and times of payment.

The parties having deviated from the original contract, and the original terms not being applicable to the new work, the plaintiff is entitled to recover, on the common count,

for the latter, although the time for completing the payments under the original agreement had not expired when the action was commenced.

not

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ROBSON
v.
GODFREY
and Another.

not then expired. After the repairs had been proceeded in to a considerable extent the parties deviated from the original plan, and the repairs had been completed in a manner to which the estimate already made did not apply.

Best Serjt. for the plaintiff, admitted in his opening, that he could not, because the original estimate had been departed from in some particulars, therefore contend that the whole contract was thrown open; but he contended that the plaintiff was to recover according to the estimate prices as far as they extended, and upon a *quantum meruit* as to the residue.

Shepherd Serjt. and *Puller*, for the defendants, contended that the plaintiff ought to be nonsuited for not having declared specially. This, they urged, was necessary, on account of the particular stipulations as to the time and mode of payment prescribed by the special agreement, according to which the time of credit for the last payment, which was to be by bill at six months, had not even then elapsed. They cited the case of *Pepper v. Burland*, Peake's N. P. C. 103. there the estimate with the terms had been reduced into writing, but the plaintiff (additions having been made to the contract) declared upon the general counts, and Lord *Kenyon* directed him to be nonsuited, holding that he was bound to declare upon the special contract as far as it went, and only for the excess on the general count; and also the case of *Ellis v. Hamlet*,

let, 3 Taunt. 52. which was an action for work done to some houses, there the contract was in writing, but could not be proved, and the plaintiff then went upon the general counts, but *Mansfield*, C. J. held, that he could not recover upon them.

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ROBSON

v.

GODFREY
and Another.

GIBBS, C. J.—I am of opinion, that there is no ground for nonsuiting the plaintiff. I have always understood the rule to be, that you may recover for work executed, as for work and labour generally, if the terms contained in the written agreement are not of such a nature as to preclude a recovery otherwise than on the contract itself. It is every day's experience that a party may recover on the general counts for work done under a special contract, but this case does not range itself within that class, for here are particular terms which render it impossible to recover under the common count. But it appears in this case that additional work has been done under a subsequent order, and it is not pretended that this was to be paid for according to the terms of the original agreement, for by that particular sums were to be paid at specified periods, and the remainder by an approved bill at six months; but there was nothing in the original agreement to govern the new work according to these stipulations, on the contrary the parties proceed upon the ground that the terms of the agreement were not applicable to the new work, and therefore the time of payment cannot be applicable. The plaintiff, therefore, is entitled to recover on the general count as to the additional work, but as to

1816.
 ROBSON
 v.
 GODFREY
 and Another.

so much as arises out of the special contract, I do not see how he can recover, since, according to that contract, payment is not yet due.

Verdict for the plaintiff, subject to a reference as to the amount.

Best and Vaughan Serjts. and *Curwood* for the plaintiff.

Shepherd Serjt. and *Puller* for the defendants.

[Attornies, *Ledwich and Winter & Son.*]

TARN, Gent. v. HEYS and Another.

An action may be maintained by a solicitor against an assignee for business done under a commission of bankruptcy although the bill has not been taxed by a master in chancery, under the st. 5 G. 2. c. 30. s. 45.

THIS was an action of assumpsit brought to recover the amount of a solicitor's bill from the defendants, who were the assignees under a commission of bankruptcy against one *Horrocks*.

It appeared that the plaintiff, a solicitor in *London*, had been originally employed to sue out the commission, and that the defendants upon being chosen assignees, and finding the plaintiff in the management of the business, had continued him in it, and had from time to time written letters to him from the country, pointing out the particular steps which they wished him to take.

Best

Best Serjt. for the defendants, contended, that inasmuch as they found the plaintiff engaged in the business which he continued to manage after their appointment, they had not made themselves liable in their private capacity, and that the plaintiff ought to look to the estate itself for his remuneration; also, that the bill ought to have been taxed by a master in Chancery pursuant to the statute, 5 G. 2. c. 30. s. 45.

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TARN, Gent.
v.
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Vaughan Serjt. and *Starkie*, for the plaintiff, referred to Lord *Ellenborough's* construction of the statute in the case of *Finchett v. How* and another(a), where a similar objection had been made.

GIBBS, C. J.—I am of opinion, that the defendants having employed the plaintiff when they found him acting in the business, are in the same situation as if they had originally retained him. With respect to the provisions of the statute, I think that they do not affect the right of an attorney against his employers, but only apply to the protection of the estate.

Verdict for the plaintiff, damages 54*l.* (b)

Vaughan

(a) 2 Campb. 279.

(b) *Common Pleas, Trinity term 1816 Arrowsmith v. Barford* — *Vaughan* Serjt. moved that the defendant might be discharged on filing common bail, on two grounds, 1st, because he had been induced

to become an assignee, under a commission of bankrupts, (for business done, under which commission by the plaintiff the action was brought,) under a representation that it would not subject him to any expence, and adly, because the action

1816.

TARN, Gent.
v.
HEYS
and Another.

Vaughan Serjt. and Starkie for the plaintiffs.

Best Serjt. for the defendant.

[*Attornies, Leigh, Mason & Houseman and Milne & Perry.*]

action had been commenced before the bill had been taxed by a master in chancery as required by the st. 5 G. 2. c. 30. s. 45., but as to this point, the court was referred to the above decisions.

The Court was clearly of opinion as to the latter ground, that

such a taxation was unnecessary, previous to the bringing an action against an assignee. Hundreds of such actions had been brought, and the objection never raised. On the former ground a rule *nisi* was granted.

IN THE KING'S BENCH.

SITTINGS AT WESTMINSTER.

DOE on the Demise of CLARK v. TRAPAUD.

1816.

Friday,
May 31.

THIS was an action of ejectment brought to recover a dwelling-house and some land situate at *Potters-bar*.

The counterpart of a lease, purporting to have been executed by a lessee of a lease granted by the mortgagor, in conjunction with the mortgagee of certain premises, cannot be read in evidence as against one who derives title under the mortgage, without some evidence of the execution of the original lease, (which has been lost) by the mortgagee.

The lessor of the plaintiff established his title as devisee in fee under the will of Mr. *Musgrave*, who was mortgagee in fee under a deed executed in 1776.

On the part of the defendant it was proved, that a Mr. *Annesley* had been in possession of the premises under a lease stated to have been granted to him by Mr. *Plaistow*, the mortgagor, for the term of twenty-one years, but determinable (upon notice) at the end of seven or fourteen years; it was also stated, that Mr. *Musgrave*, the mortgagee, had joined in this lease, and after proof that it had been lost, and that the names of the attesting witnesses were not known, it was proposed to prove the execution of a counterpart and to read it in evidence.

But proof that the original

lease was signed by the mortgagee, the subscribing witnesses not being known, would be sufficient to warrant the reading of the counterpart.

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But Lord ELLENBOROUGH held, that it would be necessary previously to give some evidence of the execution of the deed by *Musgrave*, since the execution of the counterpart by *Annesley* merely proved that he supposed that an original had been executed; and that to let in such evidence without further proof would be very dangerous to a mortgagee whose title to recover might be defeated by instruments executed between other parties.

It was afterwards proved, that the lost deed had borne the signature of *Musgrave*, and upon this the defendant was proceeding to prove the execution of the counterpart by means of a subscribing witness, but that witness not appearing, the plaintiff had a verdict.

Scarlett and *Owen* for the plaintiff.

The *Attorney-General* and *Topping* for the defendant.

[*Attornies, Burgess and Palmer.*]

DOE on the Demise of WARTNEY v. GREY.

1816.

THIS was an action of ejectment, and the principal question was, whether the defendant *Grey* claimed the possession under *Marlow*, from whom the lessor of the plaintiff also claimed by virtue of a lease for two hundred years from *Marlow* to *Allingham*, which had been assigned by *Allingham* to *Burley*, and by *Burley* to the lessor of the plaintiff, *Marlow* being a party to the two assignments.

Service of notice on the wife of the defendant's attorney at his lodgings, to produce a lease, on the evening before the trial is insufficient.

In order to warrant the admission of parol evidence of a lease from *Marlow* to *Grey*, the lessor of the plaintiff proved the service of a notice to produce the lease; this, it appeared, had been served late the evening before, upon the wife of the attorney for the defendant at his lodgings.

Lord ELLENBOROUGH deeming this notice to be insufficient, it was then proved on behalf of the plaintiff that the defendant's attorney had that morning in the hall admitted that he had the lease with him.

Scarlett, for the defendant, objected to the receiving parol evidence on the ground of this admission, and cited the case of *Exall v. Partridge*, where Mr. *Erskine* asked the witness, whether he had not the lease with him? the witness said, that

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he had it in his pocket, but Lord *Kenyon* told him that he need not produce it, and that it was incumbent on the other party to give notice in time in order to give an opportunity of producing the attesting witness.

Lord ELLENBOROUGH was of opinion, that the evidence was inadmissible, the defendant not having received proper notice.

The lessor of the plaintiff afterwards proving that *Marlow* was in possession at the time of the assignment to *Allingham*, the plaintiff had a verdict.

The *Attorney-General* and *E. Lawes* for the plaintiff.

Scarlett for the defendant.

[Attornies, *Wright* and *Pratt*.]

JUDGE v. Cox.

1816.

June 1.

THIS was an action on the case for keeping a dog, which the defendant (as alleged in the declaration) knew to be accustomed to bite mankind, and which had severely bitten the plaintiff's leg.

In an action for negligently keeping a dog, proof that the defendant had warned a person to beware of the dog lest he should be bitten, is evidence to go to a jury, of the allegation that the dog was accustomed to bite mankind.

Qu. whether such an allegation be necessary.

It appeared, that the defendant, Mrs. Cox, had about six weeks before the accident happened, taken a ready furnished house at Harrow, and found the dog upon the premises, and that she was well aware of his savage disposition, and in consequence had warned one of the witnesses to take care of the dog lest he should be bitten. The dog had been attached to a tree by means of a chain and staple, but having by a sudden exertion broken loose, he inflicted the injury on account of which the action was brought. It also appeared, that subsequently to this period the dog had bitten a child, but there was no evidence of any anterior biting.

The *Attorney-General* contended, that there was no evidence from which the jury could infer a knowledge on the part of the defendant that the dog had been accustomed to bite mankind, since there was no evidence that it had previously bitten any human being.

ABBOTT, J. intimated, that had it not been for the expression proved to have been used by the

1816.

JUDGE

v.

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defendant in warning the witness to beware least the dog should bite him, he should have directed a nonsuit. His Lordship afterwards said to the jury— In order to warrant a verdict for the plaintiff, you must be satisfied that the dog had before the time of this injury bitten some human being, and that the defendant knew it. It is not necessary now to consider whether such an action might not be sustained on a declaration charging the defendant with negligently keeping a dog of a savage and ferocious disposition, because in this case the declaration alleges that the dog was accustomed to bite mankind, and that the defendant knew it. If you are satisfied as to both of these points, your verdict ought to be for the plaintiff. I think sufficient caution has not been used, for whenever a person keeps a savage dog, he is bound so to secure it as effectually to prevent its doing mischief. After his Lordship had commented on the facts of the case, the jury found for the plaintiff. Damages, 55*l*.

Scarlett and Adolphus for the plaintiff.

The *Attorney-General* for the defendant.

[*Attornies, Jobnson and Ross.*]

DIXON v. BELL.

1816

Wednesday,
June 5.

THIS was an action on the case for having negligently and improperly entrusted a loaded gun to a young *Mulatto* girl, who discharged it against the son and servant of the plaintiff, and severely wounded him, by means of which the plaintiff had been deprived of the services of his son and servant, and had been put to great expence in medicines, &c. for his cure.

A person before he entrusts a gun to an incautious agent is bound to render it perfectly innocuous.

In an action for wounding the plaintiff's son *per quod servitium amisit*, the plaintiff is entitled to recover the amount of the surgeon's bill although it has not been paid, but he cannot recover physicians fees which have not been paid.

It appeared that both the plaintiff and defendant had lodged in the house of one *Lemon*, and that the defendant having taken other lodgings, had removed all his property thither, except a fowling-piece, which was loaded with powder, and a quantity of printing types, and had been left so loaded in the drawing room which he had occupied. After his removal, the defendant sent a *Mulatto* girl, his servant, about twelve years of age, for the gun, with a verbal message to Mr. *Lemon* requesting him previous to delivering the gun to the girl to take out the priming. *Lemon* accordingly examined the pan, but finding that it contained no priming, he delivered it to the girl, telling her to take particular care of it. She went into the kitchen, where there was a child of *Lemon*'s, and soon afterwards the plaintiff's son, a boy of ten years old, returning from school, went into the kitchen, she then took up the

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gun

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DIXON

v.

BELL.

gun and presented it at the boy, saying that she would shoot him, and immediately the contents were discharged in his face; in consequence of which, one eye was lost, several teeth struck out, and his face was much lacerated.

The *Attorney-General* for the defendant, contended, that he was not liable for the damage which had been done, since he had used such precautions as he supposed would have been sufficient to prevent any injury.

Lord ELLENBOROUGH informed the jury that they were to consider, first, whether the defendant had been guilty of negligence in entrusting such an instrument to such an agent. With respect to the instrument it was in the first instance a dangerous one, being loaded with types, and the question was, whether a reasonable and prudential precaution had been taken to render it innocent, before it had been entrusted to the care of the *Mulatto* servant. The defendant had said that he would send for the gun, and in the afternoon, it appeared that he had sent the *Mulatto* girl for it, with a message to *Lemon*, requesting him to take out the priming before he delivered it to the servant. *Lemon* accordingly had examined the pan, and found that the priming was gone; this circumstance, however did not render the instrument a harmless one, some priming having afterwards probably been shaken from the barrel, from which the charge had not been extracted, into the pan. *Lemon* however,

it might be supposed, had exercised his judgment upon the subject, since he permitted the girl to take it into the kitchen where his own children were. If the jury were of opinion that such a degree of reasonable caution was not used as to render the instrument secure in any hands, they were then to consider whether the defendant was not guilty of negligence in trusting it to a servant of such an age, who under all the circumstances, was likely to make such an use of it as a person of greater discretion would not have done. If, upon the whole, they were of opinion, that the instrument in such a state ought not to have been trusted to such a person, the plaintiff would be entitled to their verdict.

1816.

DIXON
v.
BELL.

His Lordship in advising the jury as to the measure of damages, which they were to give, in case they deemed the plaintiff entitled to a verdict, informed them, that with respect to two items, which it had appeared in evidence, were due as fees to a physician and surgeon, who had attended the plaintiff's son, (but who had not yet been paid,) that as to the surgeon's bill, they were to consider the amount as paid by the plaintiff, since the surgeon could compel the payment of it as a legal debt, but that the physician's fees could not be taken into the account, since they had not been actually paid, and he could not enforce the payment by action.

Verdict for the plaintiff, damages 100*l*.

Topping

1816.

DIXON
v.
BELL.*Topping and Holt* for the plaintiff.The *Attorney-General* for the defendant.[Attornies, *Hartley* and *Gregsons*.]

In the ensuing term, the *Attorney-General* moved for a rule to shew cause why the verdict should not be set aside, and a new trial had on the ground that the defendant had done every thing that in point of care and prudence he could be called upon to do, and that as he had put the gun into such a situation as in his opinion rendered it perfectly safe, he had not been guilty of such culpable negligence as to be liable in an action.

LORD ELLENBOROUGH. — It was incumbent on the defendant to render the instrument safe and innoxious, which by charging he had rendered capable of mischief. He ordered the priming to be taken out, but that order did not go so far as it should have done, and *Lemon* did not go beyond the order. The mischief happened for want of taking effectual care, and it is incumbent upon a party who loads such an instrument so to deal with it, as effectually to prevent accidents.

BAYLEY J. — He ought to have put it beyond the reach of danger.

Rule refused.

HELLIER and Another v. FRANKLIN.

1816.

Same day.

THIS was an action by *William Hellier* and *Richard Hellier*, as the executors of *Richard Hellier*, who was the executor of *Tilly Hellier*, against the defendant, who was the executrix of *Abraham Franklin*, upon his bond.

A bond conditioned for the payment of a specified sum to A., after the death of B. and C., and the survivor of them, will bear interest after the death of B. and C., although the engagement was perfectly voluntary. And although the principal was payable on a contingency.

The condition of the bond, recited a family arrangement, from which it appeared, that *Tilly Hellier* and *Abraham Franklin* had married two sisters, the daughters of — *Clayton*, who intended to have given them equal fortunes, and that the sum of 500*l.* had been advanced to *Franklin*, but that inasmuch as there was not a sufficient fund left to give the like sum as a portion to the wife of *Tilly Hellier*, the condition was, that if *Abraham Franklin* died without issue begotten on the body of *Lydia Clayton*, his heirs, executors, and administrators, should and would after the deaths of *Abraham Franklin* and *Lydia* his wife, and the survivor of them, pay to the said *Tilly Hellier*, &c. the sum of 500*l.*

One issue in such case having been taken on the plea of payment, according to the condition of the bond, the defendant is not entitled to a verdict on that issue, on proof of payment of the principal without interest.

Pleas : 1. *Non est factum* : 2. Payment according to the condition of the bond.

There was also a third plea in the nature of a plea of *solvit post diem*.

in such case after payment of the principal, an action can be maintained for the interest only.

Repli-

1816. Replication to the second plea, traversing the
payment according to the condition of the bond,
HELLIER and Another v. FRANKLIN. and there was a corresponding replication to the
third plea.

Abraham Franklin survived his wife, and died on the 20th of *January* 1808, having married a second wife, who was his executrix, and the present defendant. On the 25th of *August* 1810, the defendant paid the 500*l.* mentioned in the bond to one *Stevenson*, who paid it over to the plaintiffs.

The question was, whether the plaintiffs were entitled to recover interest on the 500*l.* during the interval between the time of the death of *Tilly Hellier*, and the payment of the principal.

Bayley for the defendant contended, in the first place, that since the engagement was voluntary on the part of *Abraham Franklin*, the sum would not carry interest without an express stipulation to that effect; and in general that interest was not payable without either an express stipulation appearing on the face of the instrument, or an implied one, arising by inference of law from a legal debt.

LORD ELLENBOROUGH. — Have you any case where it has been held that a voluntary gift will not bear interest after the time for payment has expired.

Bayley

Bayley admitted that he had not ; but attempted to distinguish the present case from those in which the principal was made payable on request, or upon a day certain, since in this it was payable not only not on a day certain, but on a contingency.

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Lord ELLENBOROUGH held, that since the sum was made payable on the death of the survivor, and no other time was mentioned, the plaintiffs were entitled to interest, to be computed from that time.

Bayley then contended, that as issue had been joined on the fact of payment, and since it appeared that the principal had been paid, that issue must be found for the defendant.

Lord ELLENBOROUGH. — The issue is upon payment, according to the condition of the bond, and the payment was not according to the condition.

Bayley then contended, that the plaintiffs could not, after receiving the principal, maintain an action for the interest, and he cited the case of *Dickson v. Parkes*, 1 Esp. 110. where in an action upon a *respondentia* bond, to which there was a plea of *solvit post diem*, and it appeared that the principal had been paid, Lord *Kenyon* held, that the action could not be maintained for the interest only.

Scarlett

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 {
 HELLIER
 and Another
 v.
 FRANKLIN.

Scarlett for the plaintiffs answered, that the question was, whether the defendant had paid the money according to the condition of the bond, and that the payment of the principal without interest, was not a payment according to the condition of the bond.

Lord ELLENBOROUGH allowed the plaintiff to recover giving the defendant liberty to move the point. (a)

Verdict for the plaintiff, damages 64*l.* 17*s.* 3*d.*

Scarlett and *Gaselee* for the plaintiff.

Bayley for the defendant.

[Attornies, *Gardale* and *Meyrick*.]

(a) The point was not moved.

Thursday,
 June 6.

JAMES GORDON v. HARRY GORDON.

In an action of covenant it is no objection under the plea of *non est factum*, that the deed contains material qualifications of the covenants set out, which qualifications are not noticed in the declaration.

THIS was an action of covenant.

The declaration contained covenants on the part of the defendant; 1. That if the plaintiff should be living at the end of five years from the date of the deed, the defendant would pay him for

the remainder of his life, an annuity of 300*l.*; 2dly. That at the end of ten years, the defendant would pay to the plaintiff the sum of 4,500*l.* with interest.

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J. GORDON
v.
H. GORDON.

Breaches were alleged in the non-payment of the annuity for eight years, and in the non-payment of the sum of 4,500*l.*

Pleas: 1. *Non est factum*: and 2d, that the deed had been obtained by fraud and covin.

Upon reading the deed in evidence, it appeared that it contained a proviso (not noticed in the declaration) that if *Harry Gordon* the defendant should be evicted from certain plantations mentioned in the deed, either by the crown or by any person claiming by grant from the crown, then the annuity and sum of 4,500*l.* should not be payable.

Jones for the defendant, submitted that this proviso so qualified the covenant declaration, that it ought to have been stated upon the record.

LORD ELLENBOROUGH. — By taking proper steps, the proviso might have been introduced upon the record, and the defendant might have demurred; but no advantage can be taken upon the plea of *Non est factum*.

Verdict for the plaintiff.

Marryatt

1816.

Marryatt for the plaintiff.

J. GORDON

v.

D. F. Jones for the defendant.

H. GORDON.

[Attornies, *Saxon* and *Emmett*.]

PASMORE v. BOUSFIELD.

Assumpsit. —
Plea in abatement, that A. and B. the assignees of C. a bankrupt ought to have been joined, it is not sufficient for the defendant to prove that A. and B. acted as assignees, he must prove that they were so either by the production of the assignment or by proving the admission of the plaintiff to that effect.

THIS was an action of *assumpsit*, upon an attorney's bill, and the defendant had pleaded in abatement, that several persons named in the plea being the assignees of *Hunter*, a bankrupt, and others being the assignees of *Eastburn* a bankrupt, ought to have been joined as co-defendants.

Topping for the defendant, contended, that it would be sufficient for him in the first instance to prove that the persons named in the plea had acted as the assignees of the bankrupts, for whom conjointly with the defendant, the business had been done;

But Lord ELLENBOROUGH held, that less than proof of the assignment itself would not satisfy the

A bill delivered by the plaintiff for business done for the *assured* (the defendant being one,) but in which he debits the defendant with three-sevenths only of the whole amount, is *prima facie* evidence, (the defendant having pleaded in abatement) that the action was brought to recover the defendant's particular share only.

If persons separately interested in aliquot parts of a ship employ a joint agent, they are liable in the aggregate.

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allegation, unless indeed the fact had been admitted by the parties, and that since the question was, whether all the parties had been disclosed whom the plaintiff was bound to sue, if it appeared on the face of the assignments that there were other assignees who had not been named in the plea, it would falsify the plea.

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 PASMORE
 v.
 BOUSFIELD.

It appeared that *Bousfield* the defendant had been jointly interested with the bankrupts in the ship *James*, which interest had been insured, and that the business had been done by the plaintiff on behalf of the assured. An account was given in evidence, which had been delivered by the plaintiff, in which not *Bousfield* alone, but the *assured* were made his debtors, and in which he charged *Bousfield* separately with three-sevenths of the whole charge, which amounted to 1010*l.* 2*s.* It also appeared that *Robinson* and another, who were not named in the plea, had been appointed assignees.

LORD ELLENBOROUGH. — The issue is upon the plea, that these are the parties whom he must sue who are named in the plea. Now in the account, the assured are made the debtors, but it appears that *Robinson* and another person who are assignees, have not been named in the plea, which is therefore falsified.

It was then contended, that the account at all events, would operate in reduction of damages,

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PASMORE

v.

BOUSFIELD.

since the plaintiff had debited the defendant with three-sevenths only of the whole amount.

On the other side it was contended, that the only question in issue was, whether those named in the plea were jointly liable, and that such plea being found against the defendant, he would be liable to the whole of the joint account.

LORD ELLENBOROUGH. — I consider the case just the same as if the plea were not upon the record, and as if this was an inquiry as to the *quantum* of damages before a sheriff; then the account shews that the assured were considered by the plaintiff as separately liable, and is evidence to shew that the action was brought to recover the particular share with which the defendant was charged. This evidence would come to nothing if it could be shewn that the plaintiff had been jointly retained by the assured.

It appeared afterwards, that the account had been accompanied by a conditional offer on the part of the plaintiff, that if the defendant would pay three-sevenths of the amount of the bill (which was his share, estimated in proportion to his interest,) he, the plaintiff, would endeavour to procure payment from the rest; but that the business had been done on the joint account of the assured.

Topping contended, that the defendant was not liable for more than his proportional share, according

ing to his interest in the vessel, which from the account appeared to be three-sevenths.

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PASMORE

v.

BOUSFIELD.

Lord ELLENBOROUGH. — If persons separately interested in aliquot parts, employ a joint agent, they are liable in the aggregate, for they are trusted as partners; if the plaintiffs had said, I look to him for three-sevenths only, as what is separately due from him, the case would have been different.

Verdict for the plaintiff for the whole amount.

Scarlett and Nolan for the plaintiff.

Topping for the defendant.

[Attornies, *Pasmore and Tomlinsons & Co.*]

GRONING and Others v. MENDHAM.

ASSUMPSIT for goods sold and delivered.

The defendant had purchased of the plaintiffs, who were foreign merchants, a quantity of smalts, the vessel, to whom they have been delivered on the vendee's account, he cannot afterwards in an action brought by the vendor for the amount, contend that there has been no delivery to him. — Although the captain refused to deliver the goods at the instance of the vendor, and although the vendee has not had judgment in the action of trover.

The vendee of goods recovers their value in an action of trover against the captain of

1816.

GROUNING
and Others

v.

MENDHAM.

which were to be paid for by a bill of exchange upon delivery. The smalts were accordingly shipped on board the *Euphrates* to the order of the defendant, and the bill of lading was indorsed to and delivered to the defendant, but he not having accepted the bill (as stipulated) in payment, *Sanford*, the captain of the *Euphrates*, refused at the instance of the plaintiffs to deliver the goods. The defendant then brought an action against the captain for the value of the goods, and had obtained a verdict, but the amount had been left for subsequent ascertainment, and it had been agreed that if the present plaintiffs should recover, the damages in the two actions should be set off against each other.

Topping, for the defendant, contended, that under these circumstances the plaintiffs were not entitled to recover for goods sold and *delivered*, since it appeared that they had by their own act prevented the delivery.

LORD ELLENBOROUGH.—And therefore they were liable in *tort*, and damages have actually been recovered; this assumes a right of property in the defendant, and therefore a delivery which was necessary to vest the property in him. If I deliver goods for another, and afterwards stop them before he actually receives them, I may maintain *assumpsit* for them, though I should be liable to an action of trespass for having stopt them. Here there was a delivery antecedent to the stoppage, and without

out such a delivery the defendant would not have been able to recover. If the plaintiffs could not maintain the present action the consequence would be, that the defendant would have received the value of the goods, and yet not be liable to pay for them.

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and Others
v.
MENDHAM.

Topping and Curwood then contended, that inasmuch as the defendant had merely obtained a verdict for a sum which had not yet been ascertained, and which had not been followed up by any judgment, it was not certain that the defendant would ultimately receive the amount of the goods, and that there was a distinction between a mere verdict and a judgment entered up which might have been considered as a satisfaction in lieu of the delivery of the goods.

Lord ELLENBOROUGH.—The verdict cannot now be set aside, and the only question is as to the amount of the damages which remain to be ascertained by the arbitrator. The bringing of the action by the defendant supposes a delivery to him.

Verdict for the plaintiff, damages 470*l*.

The *Attorney-General* for the plaintiff.

Topping and Curwood for the defendant.

[Attornies, *Kaye & Co.* and *Bicks.*]



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and Others
v.
MENDHAM.

In the ensuing term *Topping* moved for a rule to shew cause why the verdict should not be set aside and a new trial had. He moved this on the same grounds as were objected upon at the trial, viz. that the delivery had been prevented by collusion between the plaintiffs and the captain of the *Euphrates*, and that the defendant had neither received the goods nor any compensation for them.

LORD ELLENBOROUGH.—As between the vendor and vendee the delivery was as complete when the goods were put on board the ship, as if they had been deposited in the warehouse of the defendant on land. After the goods had once been delivered the defendant's right attached, which could not afterwards be affected by the tortious act of the captain. If the party be guilty of any tortious act after the delivery, it becomes the subject matter of an action, but a subsequent collusion with the captain cannot defeat the previous delivery. In this very case you have the value of the goods, since it has been agreed upon that the damages in the two actions shall be set off against each other.

BAYLEY, J.—If the goods had been arrested whilst they were *in transitu*, I should have assented in a great measure to the argument of the defendant's counsel, but the *transitus* was at an end and the case is the same as if the goods, after delivery in the defendant's warehouse, had been tortiously seized,

seized, and their value had been recovered in an action of trespass. The putting the goods on board the ship might or might not as between the vendor and vendee of the goods have amounted to a delivery. But the defendant insisted, that the delivery was complete, and by bringing an action against the captain affirmed, that he considered the goods to have been delivered to him, and he has recovered damages not only for the detention, but for the value of the goods, which might much exceed the price paid to *Groning and Co.* The recovery in that action passed the property to the defendant in the action, and gave *Sanford* a right to hold the goods, and he is identified with the plaintiffs. The only question in short is, as to the delivery of the goods to the defendant, and in the action which he brought he founded his claim upon a delivery to him.

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HOLROYD J. — The defendant, by bringing an action of trover, has affirmed a delivery to himself. By adopting that form of action he alleges a possession in himself and an unlawful taking of the goods by the defendant. Having recovered in an action of trover, which he could not have done without possession, he cannot now say that there has been no delivery to him.

Rule refused.

1816.

Friday,
June 7.

ENGLAND v. ROPER.

In proving the execution of a bond, it is not necessary that the attesting witness should be able to state that the blanks were filled up at the time of execution.

THIS was an action by the plaintiff, who was administrator *de bonis non*, on a bond conditioned for the payment of 2000*l*. Plea *Non est factum*.

The witness who was called to prove the execution of the bond, which bore date *June 27*, 1811, upon cross-examination, said that he did not know whether at the time of the execution the blanks in the bond had been filled up with the sums and date, &c.

Topping, for the defendant, contended, that it was necessary on the part of the plaintiff to prove that the bond was complete at the time it was executed.

But Lord ELLENBOROUGH, in addressing the jury, said: The execution has been proved in the usual way, and if an instrument signed and sealed by the party could be set aside because the witness does not recollect whether it was filled up at the time of the execution, there are very few which would stand the test. Where, for instance, a will is executed, and servants are called in for the purpose of attestation, they in general see nothing more than the signature. If the blanks were not filled up at the time of the execution, the party acknowledged

ledged nothing; but the presumption is, that by his execution of the instrument, he made some acknowledgment. The witness has proved the sealing and delivery, which is all that ninety-nine witnesses in a hundred are able to do. If the defendant has been foolish enough to sign in blank he must take the consequences.

1816.

ENGLAND
v.
ROPER.

Verdict for the plaintiff.

The *Attorney-General* and *Heath* for the plaintiff.

Topping for the defendant.

[Attornies, *Allen* and *Pearson*.]

DOE on the Demise of BIDDLE v. ABRAHAMS.

THIS was an action brought by the assignees of *Braham*, a bankrupt, to recover the possession of premises of which the defendant was in possession, for the purpose of securing a debt of 1800*l.* due to him from the bankrupt.

A. who claims to hold lands under B. as a security for a debt cannot defend an ejectment against the assignees of B. after his bankruptcy, on the ground that the grant under which B. derives his title from the crown is void.

It appeared that the title of the bankrupt was founded on a lease of the premises from the crown, for a term of which seventy years were unexpired.

Topping, for the defendant, objected that the plaintiffs were not entitled to recover, since their claim

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 }
 DOE
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 v.
 ABRAHAMS.

claim was founded on a grant from the crown for a term exceeding fifty years, but by the statute 1 *Ann. st. 1. c. 7.* all leases of lands granted by the crown for any term exceeding fifty years, or three lives, to commence from the making, were declared to be illegal.

Lord ELLENBOROUGH, after inquiring whether some more recent act had not been passed upon this subject, said, that as the defendant was in possession under the bankrupt, and *prima facie* derived title from him, he should permit the lessor of the plaintiff to recover.

Verdict for the plaintiff.

Scarlett and Comyn for the plaintiff.

Topping and Marryatt for the defendant.

[Attornies, *Mayhew* and *Curwen*.]

SANDBACK v. THOMAS.

In an action
 for maliciously
 holding the
 plaintiff to bail
 he is entitled
 in the calcula-
 tion of da-

THIS was an action for maliciously holding the plaintiff to bail for the sum of 300*l.* and obliging him to find bail, by means of which he was put to great expence, &c.

damages to recover, not merely the taxed costs, but the costs as between attorney and client.

The

The defendant, after the plaintiff had appeared, allowed himself to be nonsuited, and the costs of the present plaintiff had been taxed.

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SANDBACK
v.
THOMAS.

Parke, for the defendant, contended, that in the calculation of damages the plaintiff would not be entitled to claim for costs, as between attorney and client, but only for the amount of the taxed costs; and he cited the case of *Sinclair and Eldie*, 4 Taunt. 10. where it had been decided, that in an action for a malicious prosecution, the defendant could not be charged with the plaintiff's extra costs.

LORD ELLENBOROUGH.— If, by your act you subject a party to a legal liability to pay a sum to another, you must indemnify him against such expenses; if it were otherwise, it would come to this, that an attorney would not maintain an action against his client for the extra costs.

Verdict for the plaintiff.

The *Attorney-General* and *Comyn* for the plaintiff.

Parke for the defendant.

[*Attornies, Watson and Cowper & Lowe.*]

1816.

DOE on the Demise of MOORE v. LAWDER.

In an agreement for the sale of leasehold premises to be paid for by instalments, it is stipulated that in default of payment of the instalments at specified times, the former instalments shall be forfeited, and the vendor shall not be compellable to convey.

The forfeiture enures to destroy every right which the vendee took under the agreement, but does not affect any right of possession which he had before.

And no previous right being proved, (*semble*) the party after

forfeiture, is a mere tenant by sufferance; and it is sufficient for the owner previous to an ejectment to enter upon the premises, indicating his intention to take possession without making any formal demand of possession.

THIS was an action of ejectment.

In *March* 1813, *Moore* being tenant to *Houghton*, entered into articles of agreement with the defendant for the sale of his lease. This agreement recited, that *Lawder* had contracted with *Moore* for the purchase of the leasehold premises, and of his business of a baker, for the sum of 600*l.*, of which the sum of 150*l.* was to be paid at or before the signing of the agreement, and 50*l.* more on the 1st of *July* then next, and 50*l.* more at the end of every succeeding six months, till the whole should be paid; and it was stipulated, that when and so soon as the consideration money and interest should have been paid, *Moore* should and would assign the leasehold premises, and all his interest therein, to *Lawder*, subject to the covenants in the lease from *Houghton*; and *Lawder* agreed that he would pay the reserved rent of 50*l.* and perform the covenants in the lease; and that in case any of the *instalments*, &c. should be behind hand or unpaid for the space of one month over the time at which the same was payable, that then and in such case the instalments already paid should be forfeited, and that *Moore*

should

should not be compellable to assign and convey the premises to *Lawder*. No instalment had been paid except that which became due, *July* the 1st, 1813, but the rent had been duly paid, and under these circumstances it was contended that the plaintiff was entitled to recover.

1816.

DOE
Demise of
MOORE
v.
LAWDER.

The *Attorney-General*, for the defendant, contended, that the true construction of the agreement was, that upon default of the payment of the instalments the right of the defendant to an assignment of the lease should be forfeited; but that he was still left in possession as a tenant from year to year, having paid rent, or was remitted to such interest as he had before in the premises, and there was nothing to shew that at the time of the agreement he had newly entered into possession.

LORD ELLENBOROUGH.—This is a contract for the purchase of a leasehold interest for the sum of 600*l.* to be paid by instalments, the premises to be assigned when the whole of the instalments shall have been regularly paid, but on default of payment the former instalments to be forfeited, and the party to be released from his liability to execute an assignment. The forfeiture then affects every right to be derived by the defendant from the agreement; but if he before had any right, that would not be affected. The only tenancy which is applicable to the defendant is that of a tenant by sufferance, for the payment of rent is referable to the agreement. With a view to this point I will admit

1816. admit the plaintiff to give evidence of a demand of
 the possession.
 Doe
 Demise of
 MOORE
 v.
 LAWDER.

It was then proved, that on the 20th of —, a written demand of possession had been left upon the premises with the defendant's wife, and that an oral demand had been made on the 24th, which was the day of the demise laid in the declaration.

The *Attorney-General* objected, that notice ought to have been given to produce the written demand of possession, which was more than a mere notice; a demand was to be proved, and that being in writing ought to be proved by the best evidence. As to the demand on the 24th, that, he said, was out of the question, since the demise was laid on that day, and the law would not recognize a fraction of a day.

LORD ELLENBOROUGH.—If the party went upon the premises indicating his intention to take possession, he did all that the law requires. I am of opinion, that no demand at all was necessary.

Verdict for the plaintiff.

Topping and *Littledale* for the plaintiff.

The *Attorney-General* for the defendant.

[*Attornies, Chippendale and Winningham.*]

 GUILDHALL.

1816.

OLDERSHAW, Executor of HOLMES v. THOMPSON.

Monday,
June 10.

THIS was an action of covenant brought to recover the sum of 182*l.* 10*s.* which was claimed in respect of the rent of premises and fixtures demised by the testator to the defendant.

Covenant — plea *non est factum*, the defendant cannot give evidence of set-off, under a mere notice without plea.

The defendant had pleaded *non est factum*, and given notice of set off.

The plea of *non est factum* is not a general issue.

It was contended on the part of the plaintiff, that the defendant having merely given notice of set-off without pleading, could not be admitted to give evidence of it. The statutes 2 G. 2. c. 22. s. 13. and 8 G. 2. c. 24. s. 4. direct that where there are mutual debts, &c. such matter may be given in evidence under the *General Issue*; but that the plea of *non est factum* was not a general issue to which the statute could be considered as applicable, and that if the defendant could by means of a set-off entitle himself to a verdict on this plea, the plaintiff would be estopped by the verdict against him on the plea of *non est factum* in any future action to be brought on the bond.

F. Pollock,

1816. *F. Pollock*, for the defendant, stated, that a plea
 of *non est factum* had been decided to be a general
 issue within the statute.

OLDERSHAW,
 Executor of
 HOLMES

v.

THOMPSON.

LORD ELLENBOROUGH.—The statute must mean a general issue on which the *quantum* of damages can come in question, and if it has been decided otherwise, I think it has been wrongly so decided; if, however, you produce such a case, I shall for the present defer to it. If the defendant had pleaded *nil debet* improperly, I would have let him into this evidence, because the plea would have led to the consideration of the *quantum*. The plaintiff certainly would be estopped by a verdict against him on this plea.

His Lordship afterwards held, that the plaintiffs were entitled to take a verdict for any sum which could from lapse of time have accrued as rent since the execution of the bond.

Verdict for 202*l*.

Topping and *J. Parke* for the plaintiff.

Scarlett and *F. Pollock* for the defendant.

[Attornies, *Rosser & Son* and *Pitcher*.]

In the ensuing term *Scarlett* for the defendant moved for a new trial. The statute (he said) gave the party the option of pleading a set-off, or of giving

giving notice under the General Issue in all cases, one except, viz. where either of the debts accrued by reason of a penalty contained in a bond or specialty; but the present case was not within the exception, since there was no penalty. The plea of *non est factum*, he contended, was a General Issue within the meaning of the statute; it had been so held in the case of *Gower* and his Wife *v. Hunt*, Barnes's Notes, 191, and Buller's. N. P.; and in answer to a question by the Court, how the judgment should be entered if a set off exceeding the plaintiff's demand should be proved; he answered that either the issue of *non est factum* might be entered as found for the plaintiff, with nominal damages, or the judgment might be entered specially according to the fact.

1816.
 OLDERSHAW
 Executor of
 HOLMES
 v.
 THOMPSON.

Lord ELLENBOROUGH.—The defendant's course of proceeding is founded in a misconception of the meaning of the words "General Issue;" by that is meant a plea which puts the whole of the declaration in issue. The opinion of Mr. Justice *Denison*, at *Nisi Prius*, is more correct than that which has been cited from Barnes.

The other Judges were of the same opinion, but the Court afterwards granted a rule to shew cause why the defendant should not be permitted to plead a set off on payment of the costs of the former trial.

1816.

LAWSON and Another, Assignees of SHIFFNER
v. SHERWOOD.

In an action by the indorsee against an indorser of a bill of exchange, a witness states that either two or three days after the dishonour of the bill, notice was given by letter to the defendant, notice in two days being in time, but notice on the third too late, it cannot be left as a question for the jury, whether notice was given in time, although the defendant has had notice to produce the letter which would ascertain the time.

THIS was an action by the plaintiffs, as the assignees of *Shiffner*, a bankrupt, the indorsee of a bill of exchange, against the defendant as the indorser.

The bill in question had been accepted by *Masson*, for the accommodation of *Sherwood*, the drawer. *Shiffner* had indorsed the bill to *Thompson*, in whose hands the bill was (when it became due) on the 12th of *January*, 1815. Before the bill became due *Shiffner* applied to *Masson* in order that provision might be made for the bill when due. The witness who was called to prove notice to *Sherwood* of the dishonour of the bill on the 12th, stated that he sent a letter to him containing such notice, two or three days after the dishonour of the bill, but the witness was unable to state whether it was two days or three days.

Richardson, for the plaintiffs, contended, that since *Thompson* was the holder of the bill when it was due, notice from *Shiffner* on the second day was in good time; and that although the witness could not state with certainty whether the notice had been sent on the second or third day, yet since this might be ascertained by the production of the letter

letter itself, which was in the possession of the defendant, it was incumbent on him by the production of the letter to shew that sufficient notice had not been given; and that, at all events, in the absence of the letter, there was evidence to go to the jury that sufficient notice had been given.

1816.
 LAWSON
 and Another
 Assignees of
 SHIFFNER
 v.
 SHERWOOD.

LORD ELLENBOROUGH.—The witness says two or three days, but the third day would be too late. It lies upon you to shew, that notice was given in due time; and I cannot go upon probable evidence without positive proof of the fact. Nor can I infer due notice from the non-production of the letter; the only consequence is, that you may give parol evidence of it. The *onus probandi* lies upon the plaintiff, and since he has not proved due notice he must be called.

Plaintiffs nonsuited.

Richardson and Holt for the plaintiffs.

1816.

MENDHAM and Another v. THOMPSON and Another.

A. undertakes to act as the agent of B. in recovering the amount of an insured cargo, subject to the superior claim of C. who resides abroad. In an action by B. against A. to recover his proportional share of the amount recovered by B., an invoice sent by C. but to which A. is not privy is not admissible in evidence against A. in order to shew the extent of B.'s interest.

THIS was an action of assumpsit brought to recover the sum of 1160*l*.

The defendants, who were the agents of *Stageman* and *Bornheim*, of *Bremen*, had effected insurances upon a cargo of rum at and from *London* to *Bremen*, to the amount of 2900*l*. The rums being lost, the plaintiffs wrote to the defendants to say that they understood that the defendants had received from *Stageman and Co.* the documents necessary for recovering upon policies, and to request them to secure for the plaintiffs the sum of 1160*l*. to which they claimed to be entitled as owners of two-fifths of the cargo; and giving notice that they should consider them as liable to the plaintiffs to that amount. To this the defendants returned an answer, stating that they had no objection to act as the agents of the plaintiffs in recovering the amount insured, subject to the superior claims of *Stageman and Co.*

The sum of 2900*l*. the amount insured, had afterwards been paid to the defendants.

In order to shew that the plaintiffs were interested in the cargo to the amount of two-fifths, the plaintiffs' counsel proposed to give in evidence an
invoice

invoice made out by *Stageman and Co.*; it did not appear that this invoice was one of the documents referred to in the plaintiffs' letter, or that it had been sent by *Stageman and Co.* to the defendants. *Bornheim*, the partner of *Stageman*, was at the time of the trial in *England*.

1816.
MENDHAM
and Another
v.
THOMPSON
and Another.

Scarlett, for the defendants, contended, that the invoice was not evidence against them, since it was the mere declaration of *Stageman and Co.* to which they were not privy, though he allowed that it would have been evidence if it had been proved to be one of the documents alluded to in the plaintiffs' letter as transmitted by *Stageman and Co.* to the defendants.

The *Attorney-General*, for the plaintiffs, contended, that since the defendants had agreed to become the agents of the plaintiffs in recovering the amount of the insurance, subject to the superior claims of *Stageman and Co.* the declaration of the latter as to the amount of the plaintiffs' interest, was admissible in evidence.

Lord ELLENBOROUGH was of opinion, that if the invoice had been one of the documents referred to in the plaintiffs' letter, it would have been admissible in evidence, but that otherwise it was not, being nothing more than a declaration on the part of *Stageman and Co.* and consequently not evidence against a party who was not privy to it.

The cause was afterwards referred.

1816. The *Attorney-General, Topping, and Curwood*
 {
 MENDHAM for the plaintiff.
 and Another
 v.
 THOMPSON *Scarlett* for the defendant.
 and Another.

DOWNES v. BACK.

In an action
 for not replac-
 ing stock on a
 particular day,
 the plaintiff
 may estimate
 his damages
 according to
 the price of
 stock at the
 time of the
 trial.

THIS was an action on a bond conditioned for the replacing of stock on a particular day. It was alleged, by way of breach, that the defendant had not replaced the stock.

It appeared, that on the day specified for replacing the stock the value was 57*l.* and that on the day of trial it was 63*l.* and Lord *Ellenborough* held that the plaintiff was entitled to claim according to the value upon the day of the trial.

Manley for the plaintiff.

SHAW v. BRAN.

1816.

THIS was an action of trover to recover the value of promissory notes, cash notes, and bank notes, to the amount of 115*l.* and upwards.

A deed, by which a felon, on the eve of his trial for a capital offence, assigns his property to another, cannot be supported without proof of consideration.

It appeared that a person of the name of *Evans*, whilst he was in confinement in *Warwick* gaol on a charge of felony, about a fortnight before the assizes had executed a deed of assignment of his property to the plaintiff. The deed recited, that *Evans* was indebted to *Shaw*, the plaintiff, who was a coal-dealer in *Warwick*, in the sum of 70*l.* and also to another person of the name of *Smith*, in the sum of 17*l.* and that *Evans* was entitled to certain property in the possession of *Bran* (the defendant), a peace officer, and to other property, specified in a schedule annexed to the deed. And by this deed *Evans* did bargain, sell, assign, and set over the property lately seized and taken possession of by *Bran*, and all other his property, whether in his own custody or in that of any other person whatsoever, mentioned in the schedule, in trust to sell such as did not consist of money, and to pay the costs of the assignment, &c. and to pay the debts due from *Evans* to *Shaw* and *Smith*.

It also appeared that *Evans*, who had also been known by the name of *Bevan*, had purchased a

Y 4

horse

1816.

SHAW

v.

BRAN.

horse from *Shaw* for the sum of 30*l.* in payment for which he had given his bill for 48*l.* *Shaw* had afterwards signified to *Evans* that he was dissatisfied with the bill; but it did not appear that the bill had been dishonoured. *Evans* had been capitally convicted at the ensuing assizes.

The plaintiff having closed his case :

Gurney for the defendant, submitted, that under these circumstances, the plaintiff ought to be nonsuited; and he cited the case of *Jones v. Ashurst, Skinner, 357.* there the son brought an action of trover against the sheriff of *London*. The father who was afterwards executed for robbery and burglary, being in *Newgate* upon this charge, made a bill of sale of the goods, to the intent to make provision for his son, the plaintiff;

And *HOLT C. J.* held, that the sale was fraudulent, for though a sale *boná fide*, and for a valuable consideration had been good, because the party had a property in the goods till conviction, and ought to be reasonably sustained out of them, yet such a conveyance as the present could not be intended to any other purpose than to prevent a forfeiture and defraud the king, and that it was a fraud at common law.

That was the case of a conveyance to a child, and if any consideration short of an actual debt could be good, the making provision for a child,

would be as much favoured as any. But the present case (he said) was much stronger; for although the transactions between the plaintiff and *Evans* were involved in some obscurity, yet as far as the evidence went, it tended to negative the recital of the deed, that a debt to the amount of 70*l.* was due to the plaintiff. There was no evidence to support the statement in the recital, that a debt was due, either to *Shaw* or to *Smith*, it was easy to make that statement, but there was no evidence whatsoever as to any debt to *Smith*; and the evidence which had been given, rather shewed a debt due from *Shaw* to *Evans* than the converse.

1816.

SHAW
v.
BRAN.

The *Attorney-General* for the plaintiff, relied on the deed whose execution had been proved, and which recited the debt due from *Evans* to *Shaw*, and also the debt from *Evans* to *Smith*, the last of which he was prepared to prove by other evidence; this, he contended was sufficient, as against the defendant, who did not pretend that he held the property under any title.

LORD ELLENBOROUGH. — I am of opinion that this deed, executed as it was, by the party, on the eve of his trial for a capital offence, of which he was afterwards convicted, cannot be supported without proof of the consideration. If there had been a good consideration, the assignment would have been valid, although the object was to avoid a forfeiture. A transaction of this nature is to be regarded with a considerable degree of jealousy; I should have expected satisfactory proof of the debt

1816.

SHAW

v.

BRAN.

debt from *Evans* to *Shaw*. Some evidence has been given on the subject of the debt; it appears that *Evans* had purchased a horse from *Shaw*, and that he gave him a bill of exchange in payment, upon which some suspicion was cast, but it does not appear that it was ever dishonoured; with respect to the debt to *Smith*, such a debt is recited in the deed, but there is no proof of it. If nothing more had appeared as to the debt to *Shaw* than the recital in the deed, the case might have been attended with some difficulty, but that difficulty no longer exists, since the debt has been disproved by the evidence.

Proof was afterwards offered of the debt from *Evans* to *Smith* to the amount of 17*l.* which was objected to by

Gurney, the plaintiff having closed his case; and his Lordship was inclined to think that the fact would not make any difference, in a case which he was disposed to view with much jealousy.

Plaintiff nonsuited.

The *Attorney-General* and *Gaselee* for the plaintiff.

Gurney for the defendant.

PEIRSE v. BOWLES and SPIBEY.

1816.

THIS was an action brought to recover for business done by the plaintiff as the attorney of the defendants, in surrendering the principals in two actions, in which the defendants were their bail.

After a tender of what is due from two persons on a joint contract, a subsequent application to one of them, is sufficient to support a replication to a plea of tender, that the plaintiff subsequently demanded payment from the defendants.

Pleas, the General Issue, and a tender of 6*l*. 10*s*. Replication, a subsequent demand by the plaintiff, and a refusal by the defendants to pay that sum.

The tender was proved, and it appeared that afterwards the plaintiff had made a demand of the money from one of the defendants only.

Storks for the defendants, contended, that it was incumbent on the plaintiff to prove a subsequent demand from both the defendants;

But Lord ELLENBOROUGH held, that a refusal by one was equivalent to a refusal by both.

Verdict for the plaintiff.

The *Attorney-General* for the plaintiff.

Storks for the defendant.

1816.

WADESON v. SMITH.

Previous to the bringing an action on an attorney's bill, it is sufficient under the st. 2 G. 2. c. 23. s. 23. to deliver a bill at the defendant's last known apparent place of abode at the time when the bill was delivered.

And it is not sufficient for the defendant to shew that he had another known place of abode, subsequent to the delivery of the bill.

THIS was an action of assumpsit upon an attorney's bill, and the principal question was, whether the plaintiff in delivering a copy of his bill, had complied with the prescriptions of the statute 2 G. 2. c. 23. s. 23. which directs that the bill shall be delivered to the party charged therewith, or left for him at his dwelling-house or last place of abode.

It appeared that in *May* 1812, the defendant took lodgings in *Drury-Lane*, in which he resided till the *July* following, when he went (as the witness stated,) to a pastry-cook's in *Lisle-Street*; letters and parcels for the defendant, had been sent to the lodgings in *Drury-Lane*, for a short period after his quitting them, and the copy of the bill had been left there for him in *October* 1812.

Storks for the defendant, objected that this was not sufficient, since by inquiry at the lodgings in *Drury-Lane*, the plaintiff would have discovered that the defendant then resided in *Lisle-Street*, which was a place of abode subsequent to that in *Drury-Lane*, and consequently the bill had not been delivered at the last place of abode as was required by the statute.

Lord

LORD ELLENBOROUGH. — The bill was delivered at the last place of abode then known. The last apparent place of abode is to be taken as the last place of abode, and this as far as appears, was in *Drury-Lane*, for *non liquet* that he had any settled place of abode in *Lisle-Street*, he went thither but he might sleep elsewhere, and merely visit the place casually. You may if you can, shew that the defendant at the time of delivery, had a later known place of abode.

1816.

WADESON
v.
SMITH.

Storks said that he was prepared to shew a later place of residence, during the last two years.

LORD ELLENBOROUGH. — That will not be sufficient, the question is, whether the bill was well delivered at the time of delivery.

Verdict for the plaintiff.

Scarlett and *Gurney* for the plaintiff.

Storks for the defendant.

1816.

SIDFORD and Another v. CHAMBERS.

A letter written by the indorser of a bill of exchange, to a subsequent holder, offering to give a substituted bill in place of that which he had indorsed, supersedes the necessity of proving the intermediate indorsements stated in the declaration.

THIS was an action by the indorseees of a bill of exchange against the indorser.

The bill was drawn by *Fish* on *Hill and Co.* payable four months after date to the order of *Fish*, and indorsed by *Fish* to the defendant; by the defendant to *Sheckles*; by *Sheckles* to *Niblock and Co.*; and by the latter to the plaintiffs.

All the indorsements were stated in the declaration.

The plaintiffs proved all the indorsements, except that of *Sheckles*, and in order to supersede the proof of this indorsement, they gave in evidence a letter written by the defendant to the plaintiffs, offering to give them a substituted bill to be approved of by any moderate person, but stating that he had not money to take it up with, adding that he hoped that it was not in the hands of *Niblock and Co.*

At the time this letter was written, the bill was in the hands of the solicitor for the plaintiffs, and the indorsements were complete.

The *Attorney-General* for the plaintiffs, submitted that this evidence was sufficient, without
 8 further

further proof, and cited the case of *Bosanquet and Anderson* (a) to shew that an application by a defendant for time was an admission of liability.

1816.
 SIDFORD
 and Another
 v.
 CHAMBERS.

Lord ELLENBOROUGH remarking that the hope expressed by the defendant that the bill was not in the hands of *Niblock and Co.* who were indorsers subsequent to *Sheckles*, shewed that he knew the channel through which the plaintiffs' title had been derived, was of opinion, that the evidence amounted to proof of their title, through that channel.

Verdict for the plaintiff.

The *Attorney-General* and *R. B. Comyn* for the plaintiffs.

(a) 6 Esp. R. 42.

1816.

POOLE Assignee of LUKIN, a Bankrupt v. BELL and Another, Sheriff of LONDON.

A defendant in an action by the assignees of a bankrupt pleads the General Issue, without giving notice of his intention to dispute the bankruptcy, but before the time for pleading expires, delivers the General Issue again with notice, such notice is insufficient.

THIS was an action by the assignees of *Lukin*, a bankrupt.

The defendants before the time for pleading had expired, had pleaded the General Issue, without giving notice under the statute, to prove the several ingredients of bankruptcy, but before the time had expired, had delivered the General Issue again, with such notice.

Topping for the defendants, contended, that this was sufficient, notice having in fact been given at the time of delivering the General Issue before the time for pleading had expired.

The defendant in such a case ought to move for leave to withdraw his plea.

But Lord ELLENBOROUGH was of opinion, that the notice was insufficient; the first plea was good and effectual to all purposes, and the defendants ought to have moved for leave to withdraw their plea, in order that they might plead *de novo*, and give the proper notice, they would then have been in their entire situation; the rule was the same in the case of set off.

The *Attorney General* for the plaintiff.

Topping for the defendants.

CASES

ARGUED AND DECIDED

AT

NISI PRIUS

IN K. B.

At the First Sitzings in Trinity Term,

56 GEORGE III.

SITTINGS AT WESTMINSTER.

BRYANT *v.* CHRISTIE.

1816.

June 19.

THIS was an action by the drawer against the acceptor of a bill of exchange, dated in *November* 1813, for the payment of 75*l.* to the order of the drawer eighteen months after date.

The plaintiff having guaranteed the responsibility of the defendant to A., the latter refuses to join in a deed of composition, releasing the defendant, till the plaintiff has undertaken to pay him the full amount of his debt, the plaintiff having paid to A. the

The plaintiff having given the usual proof of handwriting, it appeared on the part of the defendant, that in *October* 1813, being in embarrassed circumstances, he made a composition with his creditors, by which they agreed to take ten shillings in the pound, in satisfaction of their respective debts, to be paid by bills for the respective

difference between the composition and his debt, draws a bill on the defendant, (which the latter accepts) in order to reimburse himself. The plaintiff cannot recover on this bill against the defendant.

1816.

BRYANT

v.

CHRISTIE.

sums of four shillings, three shillings, and three shillings in the pound, payable to each creditor at the end of two, four, and six months, from their dates. A person of the name of *Bach*, the brother-in-law of the plaintiff, had before this, at the instance of the plaintiff, and upon his representation of the defendant's responsibility, trusted him with flour to the amount of 332*l.* and on being applied to to execute the deed of composition, he declined to do it, conceiving that the plaintiff had guaranteed the debt to him, and he refused to comply until he had been assured by the plaintiff, that he would pay to him the remainder of his debt. - *Bach* then executed the deed, which bore date *October 4, 1813*, and on the 11th of the same month, he and the rest of the creditors executed a release to the defendant. The composition bills were regularly paid, and the plaintiff having paid to *Bach* the remainder of his debt, the defendant accepted the bill in question, and another of the same amount, towards reimbursing the plaintiff.

Marryatt for the defendant, contended, that under these circumstances, the plaintiff was not entitled to recover, since the effect of the transaction was to pay to *Bach* the brother-in-law of the plaintiff, the full amount of his debt in fraud of the rest of the creditors. As to the guarantee by the plaintiff, he was not bound by it, since it was not in writing.

Jervis

Jervis and *Reader* for the plaintiff, admitted that if it appeared that there was any collusion between the plaintiff and *Bach*, the former would not be entitled to recover ; but they contended, that since the plaintiff had guaranteed the payment of the defendant's debt to *Bach*, he was responsible to him for the difference between the amount of the debt, and what he received under the composition deed, and was entitled to be repaid by his principal, the defendant : they admitted, that if the bill had been given to a creditor in order to secure to him the full amount of his debt, it would have been void, but here the case was very different, since at the time when the deed was executed, *Bryant*, the plaintiff, was not a creditor of the defendant's, but only became so, when he paid the difference to *Bach* ;

1816.

BRYANT
v.
CHRISTIE.

But Lord ELLENBOROUGH was of opinion, that this was nothing more than a circuitous mode of securing to *Bach* the full amount of his debt, the whole of which eventually was paid out of the funds of the defendant.

Plaintiff nonsuited.

Jervis and *Reader* for the plaintiff.

Marryatt and *Tindal* for the defendant.

ERRATUM:

P. 328. l. 2. for Sheriff *read* Sheriffs.

CASES

ARGUED AND DECIDED

AT

NISI PRIUS

IN K. B.

At the First Sitzings after Trinity Term,

56 GEORGE III.

WESTMINSTER.

BUZZARD and Another *v.* FLECKNOE.

1816.

July 4th.

THIS was an action of assumpsit, brought by the plaintiffs as the indorsees of two bills of exchange, drawn and indorsed by *Joseph Flecknoe*, and accepted by *John Flecknoe*, the defendant.

An indorsee for value transfers the bill which is returned to him after it has become due, he may recover against the acceptor, although his indorsee before the re-transfer received satisfaction from the drawer.

Joseph Flecknoe, at the time when the bills were indorsed to the plaintiffs, was indebted to the latter in a larger sum than the amount of the bills. — The plaintiffs, before the bills (which were payable two months after date) became due, indorsed them over to one *Lord*, who held them three months after they became due, and had received another bill from the drawer for the purpose of taking up

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 BUZZARD
 and Another
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 FLECKNOE.

one of the bills ; which bill so received by *Lord* had been satisfied.

Reader for the defendant, contended that with respect to the bill for which *Lord* had received a satisfaction from the drawer, the plaintiffs were not entitled to recover in the present action ; as to that bill upon the re-transfer after it was due, they stood in the situation of *Lord*, who could not have recovered upon it, and therefore his indorsees could not. — The case was the same as if upon the re-transfer the plaintiffs had taken the bill for the first time.

But Lord ELLENBOROUGH was of opinion, that since the plaintiffs were originally indorsees for a valuable consideration, they stood in a better situation than an indorsee who took a bill for the first time after it became due. If indeed they had lost all hold upon the bills, they might have stood in the same situation with a new holder.

Verdict for the plaintiff, for the amount of both bills (a).

Jervis and *Puller* for the plaintiffs.

Reader and *Deacon* for the defendant.

(a) There was no evidence to shew that the plaintiffs, when the bills were returned, knew that *Lord* had received another bill.

CHIODI *v.* WATERS.

1816.

Same day.

THIS was an action on an alleged agreement by the defendant to employ the plaintiff as *Primo Buffo* at the English Opera, at a salary of 400*l.*, in consideration that the plaintiff would come to this country from *Amsterdam*, to perform, &c.

An agreement to employ the plaintiff in a particular situation cannot be inferred from a direction upon a letter addressed by the defendant to the plaintiff in that character, the letter itself relating to the quantum of salary only.

It was contended by the plaintiff that the defendant, in breach of his agreement, instead of employing the plaintiff as *Primo Buffo* in the first characters, had called upon him to perform inferior ones, such as the *Count*, in *Griselda*, &c.

In proof of the allegation that the plaintiff had been retained as *Primo Buffo*, he relied upon a letter from the defendant, directed to the plaintiff, "*Signior Chiodi, primo buffo, Amsterdam.*"

In this letter the defendant regretted that it was not in his power to comply with the plaintiff's request, but stated that he would engage to give him 400*l.* per annum, which, with other advantages, would amount nearly to as much as the plaintiff asked for.

Lord ELLENBOROUGH was of opinion, that since the letter itself related merely to the quantum of salary, the mere direction upon it was not sufficient

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to

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to constitute a special agreement, such as was contended for.

Plaintiff nonsuited.

Garrow, A. G. and *Lawes* for the plaintiff.

Topping and *Taddy* for the defendant.

IN THE KING'S BENCH.

GUILDHALL.

ROBINSON v. TOBIN.

A policy is effected on the plaintiff's share of goods, valued at 500*l*. but upon its turning out that the plaintiff's interest was larger, the words are added in the margin of the policy on the plaintiff's share of goods, say one-fifth,

THIS was an action of assumpsit on a policy of insurance on goods by the ship *Hazard*, at and from *Liverpool* to *Amelia* island, loss alleged by capture.

The declaration alleged the policy to have been effected on the plaintiff's share of goods, say one-fifth, valued at 1000*l*.

On production of the policy it appeared, that the insurance had originally been effected "on the valued at 1000*l*. to which the defendant's initials were subscribed, the declaration need not notice the original stipulation.

" profits of goods valued at 500*l*." to which the defendant's name was subscribed. In the margin of the policy were the words " on his share of the goods, " say one-fifth, valued at 1000*l*." and under them the defendant had subscribed the initials of his name. It appeared that after the policy had been signed by the defendant, it had turned out that his interest was larger than had before been supposed, and on that account, some days after the defendant's first subscription, the marginal words had been introduced.

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v.
TOBIN.

It was objected for the defendant, that the plaintiff ought to have averred the original agreement in the declaration, and to have stated specially the insertion of the marginal memorandum, and not to have treated the whole as one entire agreement. — But

Lord ELLENBOROUGH was of opinion, that at the time of the alteration all was in *feri*, and that the whole constituted but one agreement.

Verdict for the plaintiff.

Scarlett and Richardson for the plaintiff.

Topping and Parke for the defendant.

1816.

July 5th.

BALDNEY and Another v. RITCHIE.

A part owner of a vessel who orders supplies on his own account, without mentioning any co-part-owners, cannot plead in abatement that there are co-part-owners who ought to have been joined, the plaintiff being ignorant that there were other part-owners.

Notice to the defendant to produce an order relating to the ship, which it appears the defendant has delivered to the captain is sufficient (in default of production) to enable the plaintiffs to give parol evidence of the order, since the possession of the captain, is for this purpose the possession of the defendant.

THIS was an action of assumpsit for goods sold and delivered.

The defendant had pleaded in abatement, that as to part of the goods, the promises had been made jointly by himself and *James Ritchie*; and that as to the rest, the promises had been made by himself and *James Ritchie* and *John Ritchie*, jointly.

It appeared that the defendant had ordered from the plaintiffs a large quantity of copper for two vessels, the *Harmony*, and the *Royal Sovereign*. The order had been given by *Walter Ritchie*, the defendant, in his own name, without making mention of any partners. *Walter Ritchie* had sent an order to the captain of one of these vessels to authorize the delivery to the plaintiffs of the old copper: this order had been signed by *Walter Ritchie* in his own name.

It was objected, on behalf of the defendant, that parol evidence of this order was not admissible; it had been proved to be in the custody of the captain, and he ought to have been subpoenaed. —

The plaintiffs had given notice to the defendant to produce upon the trial, all letters and other documents, &c. relating to the cause, and it was answered, for the plaintiffs, that a delivery to the captain, was for this purpose equivalent to a delivery to the defendant.

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Lord ELLENBOROUGH was of opinion that there was such a privity between the owner and the captain, that after notice to the former, the evidence was admissible.

The terms of the order were, "deliver the copper of *my* ship the *Harmony*." It further appeared, that the name of *Walter Ritchie* only was exhibited upon the door of his office of business in *London*; and that, upon application to him for payment, the bill having been made out in his own name, he objected only to the amount, and offered to give a bill for a smaller sum, which the plaintiffs' agent was not authorized to accept.

On the part of the defendant, it appeared in evidence, that a bill of sale of the ship *Harmony* had been executed, transferring the property to *Walter Thomas* and *James Ritchie*, and that a bill of sale had been executed of the *Royal Sovereign*, transferring the property to *Walter, James, John, and Thomas Ritchie*; and that the ships had been duly registered in the names of these persons respectively, as the owners, upon the oath of *Walter*

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RITCHIE.

Ritchie and others. It also appeared, that the defendant, and *James* and *John Ritchie*, had carried on business as general partners at *Greenock*; and that *Thomas* was dead.

Upon this evidence, it was contended, on the authority of *Du Bois* and Others, Assignees, &c. v. *Ludert*, 1 *Marshall*, 246, that the defendant was entitled to a verdict: the Court there held, that the defendant might plead a secret partnership in abatement, although the plaintiff had no means of knowing of the partnership, and could not have proved it.

That case, it was contended, was stronger than the present, since in the case of a ship the party might, by consulting the Register, ascertain who the owners really were.

The Counsel for the plaintiff, in answer, cited the case of *Doo v. Chippenden, Abbott, part I. c. 3. s. 8.* where Lord *Kenyon* held at *Nisi Prius*, upon a plea in abatement, that if the person who gives credit for the repairs of a ship and for necessities supplied for the use of the ship, does not know at the time that there are other part-owners, he may sue him alone from whom he receives the orders.

Lord ELLENBOROUGH in summing up to the Jury, informed them, that the question for their consideration was, whether the defendant had by his

his contract rendered himself separately liable, although other parties were jointly interested with him in the ship, and might have been sued conjointly with him. A general partnership would not have rendered the copartners jointly liable for materials supplied to the ships, since in such cases the partnership was to be governed by the Register. That if the plaintiffs had applied to the Register, since the oath of one would not have bound the rest, they must have gone through the further process of making inquiry, whether those whose names appeared as the owners in the Register, had authorized the entry. His Lordship, after commenting on all the circumstances of the case, and observing, that if the defendant had meant that the demand should be made upon all, he ought to have given some intimation to the plaintiffs that others were jointly interested with him, left it to the Jury to say, whether the contract had been made by the defendant solely, or by him and the others who might have been joined.

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The Jury found for the plaintiffs.

The defendant being under a condition to give judgment of the preceding term, the counsel for the defendant moved, that under the circumstances judgment might be stayed till the next Term, in order to give an opportunity of having the matter more fully considered, and suggested that Lord Kenyon's decision had been adverted to in the case of

1816. of *Du Bois v. Ludert*, which had been very much
considered by the Court of Common Pleas, and
where they held, notwithstanding that authority,
that it was competent to a partner on a plea in
abatement, to bring forward a secret partner.

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LORD ELLENBOROUGH. — With all the respect which I entertain for the opinion of that Court, I think that a person after treating *de plano* as on his own account, without any intimation of a partnership, ought not to be afterwards allowed to spring a mine upon the plaintiff, by bringing forward a partner for the first time by his plea in abatement. This was the opinion I entertained before I was furnished with the decision by Lord *Kenyon*, by which that opinion is supported. My only doubt arose from the consideration of the manner in which the property in a ship is acquired, and whether those means might not afford a more easy access to a knowledge of partners than in other cases. But this circumstance does not advance the matter, since in the first place a party possesses no compulsory means of obtaining access to the Register; and if he could the Register would not be conclusive.

The motion was accordingly rejected.

Garrow, A. G. and *Stephen* for the plaintiffs.

Scarlett and *Littledale* for the defendant.

BAMFORD v. HARRIS.

1816.

THIS was an action of assumpsit to recover the sum of 36*l.* 4*s.* 11*d.* for work done by the plaintiff, a dyer, who had been employed by the defendant, a hat-manufacturer, in dyeing his hats. — The defendant had paid the sum of 30*l.* into court.

The plaintiff having proved work done to this amount, at the rate of 9*s.* for every dozen hats,

The *Attorney-General* for the defendant, relied upon a custom in the trade, that the damage done to hats in the process of dyeing, was to be sustained by the dyer, and that the amount was to be deducted from the sum to be paid to the dyer for his labour.

Several witnesses were called, who stated, that the hats when sent to be dyed are in a very soft state, and that in the process blocks of wood are inserted in them, which renders them liable to an injury termed the dye-gall, which is occasioned by the rubbing off the fine part of the beaver from the edge of the crown, by letting the hat fall by accident or by attrition against the sides of the vessel. That the damage done to each hat by the dye-gall varied

Where by the custom of the hat trade the amount of the injury sustained by the hats in the process of dyeing is always to be deducted from the charge for dyeing, the defendant is entitled to such deductions in an action brought by the-dyer, without giving any notice of set-off, and although there has not been any previous adjustment of the amount of the damage.

1816.

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varied from the sum of 4s. to 8 or 9s. They all agreed, that the loss in such cases was to be sustained by the dyer; it was very easy to discover the dye-gall, and the dyer was liable although no particular negligence was imputable to him. With respect to the mode in which the compensation was to be made, some of the witnesses stated, that the amount was usually adjusted so as best suited the convenience of the parties; in some instances the dyer selling the galled hats to the best advantage he was able, and in others the owner taking them back, and making a deduction for the loss as much in favour of the dyer as he could. Other witnesses stated the custom to be for the employer to deduct for the damage from the general account against him for dyeing. It was also proved, that six dozen of the hats, for the dyeing of which the plaintiff claimed, had been dye-galled, and that the damage exceeded the sum in dispute.

For the defendant it was contended, that the custom proved nothing more than that the damage accruing from the dye-gall was, when ascertained, to be sustained by the dyer, which was nothing more than the law would direct without any custom, and that before it could become the subject matter of a set-off, it was necessary that the amount should have been previously ascertained; for it did not assume the shape of a debt till it had been liquidated and ascertained, and that after such liquidation

liquidation a notice or plea of set-off was necessary.

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Lord ELLENBOROUGH left it to the jury, upon the evidence whether a custom had been proved to the effect contended for by the defendant, namely, that the damage sustained from dye-gall was to be deducted from the general account claimed by the dyer; and

The jury found for the defendant.

Garrow, A. G. and Comyn for the plaintiff.

Scarlett and Gurney for the defendant.

LONGDILL v. JONES.

THIS was an action against the Sheriff of *Montgomeryshire*, for money had and received to the plaintiff's use.

An action for money had and received at the suit of a plaintiff who has sued out a *fiery facias* lies against the sheriff who executed it, if he retain more money in his

The defendant having executed a writ of *fiery facias* at the plaintiff's suit, returned that he had levied to the amount of 22*l.* 10*s.* 11*d.*, but claimed to retain the sum of 12*l.* 13*s.* 11*d.* for rent paid to hands than he is entitled to do, the party injured not being bound to proceed by motion in Bank.

the

1816. the landlord to the amount of 1*l.* 11*s.* for auctioneer's expences, sheriff's poundage, &c.
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v.
JONES.

Scarlett for the defendant, contended that the plaintiff was not entitled to recover against the sheriff in such an action. The sheriff, according to the exigency of the writ, was to have the money in court on a certain day, and if he was guilty of any irregularity, it was for the Court to deal with him; but that the plaintiff had no right to call upon the sheriff except through the medium of the Court.

LORD ELLENBOROUGH. — If the Sheriff retain more in his hands than he ought to have retained, he is liable to the plaintiff as for money had and received to his use. He is entitled to his poundage, which is the strict legal remuneration for his trouble.

Verdict for the plaintiff. — Damages 5*l.*

F. Williams and *Ross* for the plaintiff.

Scarlett for the defendant.

SITTINGS AT WESTMINSTER.

HANCOCK v. WELSH and COOPER.

1816.

July 8th.

THIS was an action of assumpsit, brought to recover the sum of 55*l.* as one half year's rent due from the defendants as tenants of the plaintiff's farm, from the 22d of *June*.

In an action of replevin, between the assignees of a bankrupt (who was formerly tenant to A) and the bailiff who distrained, one issue is, whether the assignees are tenants to A. A verdict against the assignees, on this issue, is afterwards conclusive as to the tenancy of the assignees in an action brought by A. for rent.

A person of the name of *Evans* being tenant to the plaintiff of the farm in question, committed an act of bankruptcy on the 19th of *June*, on the 22d a commission issued, on the 23d a provisional assignee was appointed, and on the 8th of *July* the defendants were appointed assignees; and on the evening subsequent to the appointment, in order to prevent the cattle from being distrained for rent, they entered upon the premises and drove them off. The cattle were afterwards pursued and seized by *Myers*, the plaintiff's bailiff, for the rent due *June* the 22d. — The defendants replevied the cattle, and *Myers* having made cognizance as the bailiff of the present plaintiff, one issue in the action of *Welsh and Cooper v. Myers* was, whether *Welsh and Cooper* held the farm as the assignees of *Evans* at the time of the distress. This issue having been found against them, it was now contended that the judgment was conclusive upon the question whether the defendants were liable, as the assignees of *Evans*,

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Evans, to the half year's rent, since it proved them to have been the tenants at a period subsequent to the 22d of *June*.

It was contended for the defendants, that a mere entry on the premises for the purpose of taking away the cattle, could not render the assignees liable as tenants; and the case of *Wheeler v. Bramah*, 3 *Campb.* 340. was referred to; and it was urged that the record in *Welsh and Cooper v. Myers*, was not admissible in evidence on the present occasion, since the parties were not the same.

LORD ELLENBOROUGH.—As to the case of *Wheeler v. Bramah*, I am still of the same opinion. The assignees upon their appointment were entitled, if they chose it, to relinquish the lease as *damnosa hæreditas*, but if they once assumed the character of tenants, they could not afterwards divest themselves of responsibility as tenants. If they had joined issue on this point with a mere stranger, the verdict would have been evidence against them, and being evidence, I think it is conclusive evidence.

Verdict for the plaintiff.

Topping and Spankie for the plaintiff.

Garrow, A. G. and Espinasse for the defendants.

DOE on the several Demises of the Bishop of
LONDON, and of MARSHALL v. WRIGHT.

1816.

THIS was an action of ejectment brought to recover the possession of seven poles of land in front of *Marshall's* house at *Hornsea*.

The land in question which adjoined the highway, was part of the manor of *Hornsea*, of which the Bishop of *London* was the lord, and *Marshall* claimed by virtue of an Inclosure Act, which authorized the commissioners to sell part of the wastes to be enclosed, in order to defray the expences.

The commissioners acting under this authority had sold to *Marshall* the land in question.

The defendant relied on a clause in the Inclosure Act, (which is usually inserted in such Acts,) by which it was enacted, that no encroachments on the waste which had existed for 20 years before the passing of the Act, should be considered as part of the waste, and that no title derived by virtue of such encroachment should be disputed. And it was proposed to prove, that the land in question had for 40 years back been continually occupied by *Wright*, who was a carpenter, and those who had before him carried on the same business in the adjoining premises, by placing timber there, by putting up stakes upon it, and

A party who has enjoyed an encroachment upon a common for more than twenty years is not precluded from shewing such enjoyment when his title is disputed, by having subsequently accepted a conveyance of contiguous land in which the land in dispute is described as waste land.

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by raising a small bank between the land and the road.

The defendant proceeding to prove such occupation,

Topping for the plaintiff objected, that the evidence of such occupation previous to the year 1787 was inadmissible, inasmuch as in that year the defendant had accepted a conveyance of an adjoining piece of land by the homage which in setting out the abutments, described the land now in dispute as waste land. Having therefore adopted the description of the land as waste at that time, he could not now contend that it was antecedently an encroachment from the waste.

LORD ELLENBOROUGH. — Its leading description at that time was waste, and it was properly described as such. Afterwards the Act attached on the possession, and what was before waste, became by the operation of the Act of another quality. I think therefore that the whole of the evidence may be gone into.

The defendant having proved the occupation as above stated, Lord *Ellenborough* was of opinion, that since the land had been so long occupied by putting up stakes, depositing wood there, and by a kind of enclosure (the bank) from the road, the defendant was entitled to a verdict.

Verdict for the defendant.

Topping

Topping and *Espinasse* for the plaintiff.

The *Attorney-General* for the defendant.

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HUME v. OLDACRE.

THIS was an action of trespass, *quare clausum fregit*.

The declaration alleged that the defendant, on the 27th day of *March*, and on divers other days and times, between that day and the exhibiting of the plaintiff's bill, broke and entered the plaintiff's close, &c.

For the plaintiff it was proposed to give in evidence two acts of trespass, one on the 4th of *March* before the time laid in the declaration, and another within the time; but on the objection being taken,

Lord ELLENBOROUGH held, that it was competent to the plaintiff to give in evidence one act of trespass anterior to the time laid in the record; but that in such case, he would be confined to one act of trespass, though he might give in evidence any

mischief immediately occasioned by the defendant himself, but also for that done by the concurrence of people who accompanied him.

In trespass quare clausum fregit, laid to have been committed on a particular day, and on divers other days and times between that day and the exhibiting of the bill, &c. The plaintiff may prove an act of trespass anterior to the day specified, but he will be confined to that single act. In an action of trespass against a huntsman for hunting over the lands of another, damages may be recovered, not only for the

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number of acts of trespass within the time laid in the record, if he confined himself to that time.

It appeared that the defendant was the huntsman to a society called the *Berkeley Hunt*, and that the defendant followed the hounds, accompanied by a concourse of people, over the plaintiff's land.

Gurney, for the defendant, in his address to the jury, contended, that they were to estimate the damage according to the mischief which the defendant had individually occasioned by his trespass. But,

Lord ELLENBOROUGH interfered, stating his opinion, that the defendant, being a co-trespasser, was liable to answer for the whole of the damage.

Verdict for the plaintiff.

The *Attorney-General*, *Scarlett*, and *Spankie* for the plaintiff.

Gurney and *Bolland* for the defendant.

MARSH and Another, Assignees of HARRISON and
Others v. MEAGER. 1816.

THIS was an action on a bill of exchange, accepted by the defendant, and indorsed to the bankrupts.

No notice having been given under the statute; for the purpose of disputing the bankruptcy, the deposition of a witness was read, from the proceedings under the commission, in order to prove the act of bankruptcy.

The deposition (dated on the 20th) stated, that *Harrison* and the other partners, absented themselves on the 8th, and that they had admitted, in a conversation with the deponent, that they had absented themselves for the purpose of avoiding their creditors: the date of the conversation was not specified.

Gifford for the defendant, objected, that this was not evidence of an act of bankruptcy, since it did not appear that the conversation was either contemporary with the act of absenting, or immediately subsequent to it.

Lord ELLENBOROUGH, being of that opinion, the plaintiff was nonsuited. (a)

(a) See *Bateman v. Bailey*, 5 T. R. 512. *Ambrose v. Clendon*, Ann. 267. *Cas. temp. Hardw.* 267. *Robson v. Kemp*, 4 Esp. 233.

In an action by the assignees of a bankrupt, where no notice has been given to dispute the bankruptcy, a deposition, stating that the bankrupt absented himself, and that the bankrupt had admitted that he absented himself for the purpose of avoiding his creditors, but not specifying the time of such admission, is not *prima facie* evidence to prove the act of bankruptcy.

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The *Attorney-General* and *Marryatt* for the
 plaintiff.

Gifford for the defendant.

REX v. CUTLER.

A patentee in the specification sums up the principle in which his invention consists; if this principle be not new the patent cannot be supported, although it appear that the application of the principle, as described in the specification, is new.

THIS was a *scire facias*, brought to repeal letters patent which had been granted, for an invention claimed by the defendant.

The material question arising on the pleadings, was, whether the invention was new.

It appeared, from the defendant's specification, that the invention consisted in a new mode of feeding the fire in a grate, by a supply of fuel from below, instead of from above, in the usual way. — The coals intended to be consumed in the course of the day, were to be deposited in a chamber beneath the grate, so placed, that at first the higher surface of the chamber was to be on a level with the lower surface of the grate. The fire being afterwards lighted in the grate, as the coals in the grate were gradually consumed, their place was to be supplied by winding up the coals from the chamber, by means of a rack and pinion. The coals, as long as they remained in the box, were unignited, the air being ex-

cluded from below, and did not become ignited, until, by being wound up into the grate, they had been brought into contact with the coals previously ignited and exposed to the access of the air.

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The defendant, in his specification, had summed up the amount of his claim; stating, my invention consists in this, that the fuel necessary for supplying the fire, shall be introduced at the lower part of the grate, in a perpendicular, or in an oblique direction : as to the manner of performing it, it is set forth in the annexed descriptions and drawings.

In order to disprove the novelty of this invention, evidence was given that Mr. *Marriott*, a manufacturer of grates and stoves, had in the year 1812 made a model (which was produced) of a grate and its appendages, for cooking. The grate, which was of considerable length, was furnished with a door ; when this door was open, the grate in no respect differed from an ordinary one, but when the door was shut, no part of the grate was visible except a few of the highest bars ; and the whole of the grate having been filled with coals, and the coals within the bars above the door having been lighted, the coals in the lower part of the grate were carried up, for the purpose of supplying the consumption above by means of a rack and pinion, at the discretion of the cook. The principle of this grate, it was contended, was precisely the same with that for which the patent was claimed ; the lower

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part of the grate, when the door was shut, being in effect a closed chamber, to which the air had no access, and the coals being gradually wound up from this chamber so as to afford a supply to the fire above. — *Marriott* stated that he had also applied the same principle to a common grate long before the date of the patent. — Another manufacturer, of the name of *Coombe*, exhibited a grate for cooking nearly on the same construction. The grate was supplied with two doors, one above the other; when both were shut, the air was supplied by a ventilator from below; when the lower door was shut, and also the ventilator, and the higher door thrown open, the closed part of the grate supplied the place of a chamber, from which the coals were wound up by a rack and pinion, in order to supply the fire above as it was wanted for culinary purposes.

It was contended for the defendant, that his invention went beyond that exhibited in these grates; in the latter there was no fresh introduction of fuel into the grate, so as to give a perpetual supply, there was nothing more than a means of contracting or compressing coals already within the grate, which could not be done without gradually diminishing the size of the grate itself. According to the defendant's construction, on the contrary, the chamber was independent of the grate, placed below it, and the fuel was gradually wound up from the chamber without at all contracting the size of the grate itself. It was also contended, that there were
some

some minor advantages which the patent grate possessed over those which had been exhibited in evidence.

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LORD ELLENBOROUGH was of opinion that the principle on which the two grates were constructed was identical with that described in the terms of the specification, which was for a mode of supplying fuel from below, and there was nothing predicated in the specification of raising the fuel from below the grate; it was merely for elevating a supply of fuel from below, and that the defendant had confined himself by thus summing up the extent of his invention, to the benefit of this principle.

Verdict for the Crown.

The *Attorney-General*, *Bolland*, and *Dowling*, for the Crown.

Topping, *Scarlett*, and *Gaselee*, for the defendant.

REX v. the Inhabitants of HAMMERSMITH.

THIS was an indictment for the non-repair of two roads.

If the description of an highway in an indictment for

the non-repair of it be too indefinite, being equally applicable to several highways, advantage should be taken by plea in abatement, and the description given, if true in fact, cannot be objected to at the trial under the plea of the general issue.

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 v.
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One count alleged, that in the hamlet of *Hammersmith*, in the parish of *Fulham*, in the county of *Middlesex*, there was a certain highway leading from *Hammersmith* towards and unto *Uxbridge*, in the same county.

Marryatt for the defendant, objected that the description was too indefinite, since it would equally apply to many other roads, it might as well have been described as the road to *London*.

LORD ELLENBOROUGH. — But is it not true that it does lead from *Hammersmith* to *Uxbridge* as alleged; if so, and there had been five other roads to which the description would equally have applied, you should have pleaded in abatement, alleging that all these roads were equally well known by the description given in the indictment; but the objection cannot be taken under the plea of *Not Guilty*.

There was a verdict for the Crown as to one of the roads. (a)

(a) In this case the prosecutor was examined for the prosecution, and no objection was taken to his competency, and (semble) a prosecutor in such case is a competent witness, since, though the court is authorized to award costs against the prosecutor in case the proceed-

ing shall appear to have been vexatious, yet the court would scarcely presume, in the first instance, that the prosecutor's conduct had been vexatious, so as to raise an objection to his competency, especially after the finding of a bill by the Grand Jury.

Gurney

Gurney and Andrews for the prosecution.

Marryatt and Reader for the defendants.

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REX v. HILL DARLEY and Others.

THIS was an indictment against three defendants, for winning from the prosecutor, at one sitting, more than 10*l.* to wit, the sum of 1355*l.* 12*s.* 6½*d.* against the statute 9 *Ann.* c. 14. s. 5.

Upon an indictment for winning more than 10*l.* at one sitting, &c. under the Statute 9 *Ann.* c. 14, s. 5. the defendant may be convicted of winning a less sum than that stated in the indictment.

The prosecutor stated, that he had when he began to play, two bills of exchange, one for 123*l.* and the other for 1200*l.*; and also between 80*l.* and 90*l.* in money, and that he first played with *Bennett* (one of the defendants) alone, to whom he lost about 80*l.*

Gurney objected, that the indictment could not be sustained, since part of the money was lost to *Bennett* alone, and admitting, that the bills of exchange could be considered as money, and that they were won by the three defendants jointly, they would not make up the amount charged to have been won, *viz.* 1355*l.* 12*s.* 6½*d.* But it was necessary, he contended, to prove the sum precisely as laid, since the judgment of the Court upon it is, "*quod convictus est.*" *R. v. Luckup, Str.* 1048, and

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REX

v.

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DARLEY
and Others.

and the judgment is to be the foundation under the statute, of an action to recover a penalty to the amount of five times the sum won. — But

Lord ELLENBOROUGH was of opinion, that although if the prosecutor had averred in the indictment that the defendants had won bills of exchange of a specified amount, the allegation must have been proved as laid; yet that since the sum only was averred, and that under a *videlicet*, the prosecutor was entitled to prove the winning of a smaller sum.

The defendants were afterwards found guilty of winning a smaller sum than that alleged in the indictment.

Garrow, A. G. and Marryatt for the prosecution.

Gurney, Nolan, and Spankie for the defendants.

See *Rex v. Gilbam*, 6 T. R. 265. *Rex v. Burdett*, 1 Lord Raym. 149. *Rex v. Baynes*, Lord Raym. 1265.

RAWSON and Another v. WALKER and Another.

1816.

THIS was an action on a promissory note, for the payment of 66*l.*, *on demand*, to the plaintiffs.

The plaintiffs were the assignees under a commission of bankrupt against *Lightfoot* and another, and had sold a quantity of furniture; part of the bankrupt's estate, to one of the bankrupts, and the defendants had given the note in question as a collateral security for the payment of the price of this furniture. No final dividend had been paid under the commission, and no allowance had been received by the bankrupts from the assignees, and the vendee had become bankrupt a second time within a twelvemonth.

On the part of the defendants it was contended, that the payment was to be made out of the bankrupts' allowance as far as it went, and the residue only by the defendants, in case the allowance should not be sufficient to discharge the debt. That this was contrary to the duty of the plaintiffs as assignees, to sell upon such a collateral and conditional security, and that at all events the note could not be put in suit till a final dividend should have been made, by which it would be ascertained to how much the defendants were liable, and that it was competent to the defendants to shew what the real terms were, on which the note was given.

The assignees under a commission of bankrupt may maintain an action on a promissory note given as a collateral security for goods sold by them to one of the bankrupts.

The defendants undertaking by such note to pay *on demand*, cannot adduce evidence to shew a liability on a contingency only.

Lord

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and Another

LORD ELLENBOROUGH. — I am ready to admit any evidence for the purpose of shewing that the consideration of the note was illegal, but I cannot receive parol evidence inconsistent with the terms of the note. — By this instrument, the defendants undertake to pay the amount of the note upon demand, and they cannot adduce evidence to shew that it was not to be so paid, but upon a contingency only.

Verdict for the plaintiffs.

Garrow, A. G. and Puller for the plaintiffs.

Jervis and Campbell for the defendants.

See *Hoare and Others v Graham and Another*, 3 Camp. 57. *Raines v Knightly, Skinn.* 454.

IN THE KING'S BENCH.

SITTINGS AT GUILDHALL.

BILLINGS *v.* WATERS.

1816.

THIS was an action of assumpsit for work and labour, &c.

The defendant was the petitioning creditor under a commission of bankrupt against *Allen* and another, and the action was brought by the plaintiff for services rendered by him as a messenger under the commission.

The principal question was, whether the defendant was liable for the expences of a journey by the plaintiff to the Isle of Man, which had been suggested as advisable by the solicitor under the commission, in order to ascertain what property the bankrupt had there, before it became notorious that a commission had issued, and to secure as much as the laws of the island permitted him to do for the benefit of the creditors. — The case of *Hartop v. Jukes*, 2 *Maule & Sel.* 438, was relied on to shew, that previous to the assignment the petition-

A messenger cannot recover against the petitioning creditor the expences of an unnecessary and fruitless journey to the Isle of Man, without specific authority from the petitioning creditor.

ing

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ing creditor was liable to the messenger for his fees for business done under the commission. And it was proved that the solicitor had stated to the defendant that the messenger was going out to the *Isle of Man* upon their business, and that the defendant referred him to *Birnie*, his partner, who did not oppose the measure, but inquired whether it would be necessary to employ an attorney there.

Lord ELLENBOROUGH. — The case of *Hartop v. Jukes* does not contain any new principle: the defendant was there held to be liable on the ground of the special contract; although it may be convenient that the messenger shall receive his fees through the medium of the attorney, the latter cannot be compelled to pay them. The petitioning creditor is liable for all necessary expences; and the question here is, whether these expences are necessary. He may indeed, by his contract, render himself further liable, but has he done so? The sending a messenger from *England* for the purpose of seizure would not be necessary, even supposing that the property was liable to be seized.

On the part of the defendant it was contended, that although, in general, the petitioning creditor is liable for the business which is necessary to be done under the commission, yet that in this instance, with respect to the journey to the *Isle of Man*, the defendant was not liable, since the measure was unnecessary, and had been undertaken at the

the instance of the solicitor, who had, in fact, solely employed the messenger, and that the defendant had done nothing more than make a deposition of the debt, in order to give efficacy to the proceedings.

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WATERS.

Lord ELLENBOROUGH was of opinion, that a dividing line should be drawn between those expences which were essential to carrying the commission into effect, and the expences of a fruitless journey. The expences would be endless if a messenger were to be sent to every quarter where property of the bankrupt was expected to be found, and where inquiry ought to be made; he might be sent to *South America*. If such inquiries should be necessary, they might be made by letter. The petitioning creditor was certainly liable to the expence of suing out the commission, advertizing in the *Gazette*, and other charges necessary, in order to give effect to the commission, but the solicitor ought to use a sound discretion on the subject, and neither he nor the messenger could charge expences wholly unnecessary without special authority from the petitioning creditor. The question therefore for the jury was, whether they deemed the expences of the journey to be necessary.

The jury found a verdict for the plaintiff for the sum of 8*l.* 2*s.* 4*d.* excluding the expences of the journey.

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Jervis and Nolan for the plaintiff.

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v.

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Garrow, A. G. and Scarlett for the defendant.

See *Finchett v. How and Jarratt*, 2 Camp. 275. *Tarn v. Hayes*, supra. 278. *Arrowsmith v. Barford*, ib. in not. *Hartop v. Jukes*, 2 Maule & Sel. 438.

TWENTYMAN v. HART.

A mere mortgagee of a ship who does not take possession is not liable for necessities supplied for the use of the ship previous to a re-transfer.

THIS was an action of assumpsit, to recover the amount of necessities provided for a vessel, of which the defendant was the mortgagee.

Flowerdew, the owner of the vessel, being indebted to the defendant, indorsed the certificate of registry to him, as a collateral security, and afterwards a new register was made in the name of the defendant. The defendant afterwards delivered up the old certificate, but did not make a re-transfer of the vessel. The order for the goods was given by the captain of the vessel, who gave the name of *Flowerdew* as the owner, and the plaintiff knew no other owner than *Flowerdew* in the transaction.

Under these circumstances, *Marryatt* for the defendant contended, that he was not liable to the present demand, and he cited the cases of *Jackson, v. Vernon*,

v. *Vernon*, 1 *H. Bl.* 114. *Chinnery v. Blackburn*, 1 *H. Bl.* 117. (*in not.*) *Young v. Brander*, 8 *East*, 10. and *Frazer v. Marsh*, 13 *East*, 288. as decisive to shew that a mere mortgagee of a ship, who does not take possession, is not liable for supplies provided to a ship.

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MAN
v.
HART.

Lord ELLENBOROUGH. — Since the repairs were done by order of the captain, and the plaintiff knew no owner except *Flowerdew*, and the defendant was never in possession of the ship, the plaintiff must be called.

Plaintiff nonsuited.

Gaselee and — for the plaintiff.

Marryatt for the defendant.

See *Westerdell v. Dale*, 7 T. R. 306. and *Abbott*, Part I. c. 1. s. 11, 12, 13, 14.

GUTHRIE and Another v. WOOD.

THIS was an action of trover, brought to recover the value of a number of presses and other articles, under the following circumstances.

Goods seized and sold by the landlord under a distress for rent without

any collusion, and purchased by a trustee of the tenant's estate under an assignment by such tenant, for the benefit of the creditors, out of the trust funds, are not liable to be taken in execution by an annuity and judgment creditor, although they are permitted by the trustees to remain in the possession of the tenant.

C C 2

Eastman,

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GUTHRIE
and Another
v.
WOOD.

Eastman, who was a packer, was the proprietor of the goods in question, and he made an assignment of them to *Wood*, the defendant, as the trustee for *Hewitt*, in order to secure the payment of an annuity sold by *Eastman* to the latter. *Eastman* afterwards assigned his counting-house, fixtures, and utensils in trade, to *Guthrie* (one of the plaintiffs) and others, for the benefit of his creditors, subject to the annuity to *Hewitt*. *Eastman* was permitted to remain in possession of the goods, and whilst he continued in possession, *Pearson*, the landlord of the premises, sent in a distress for rent, and the goods in question were sold under the distress, and purchased by *Guthrie*, who paid for them (as was contended on the part of the defendant) out of the funds which he held in his hands, for the benefit of the creditors, and charged the amount of the purchase to them. *Eastman* still remained in possession of the goods, and they were seized under an execution, at the suit of *Wood*, as the trustee of *Hewitt*.

For the defendant, it was contended, that the plaintiffs could not, by purchasing the goods out of the creditor's funds, defeat the annuity; that the whole transaction was a mere shuffle, to effect this object, *Guthrie* having declared that, having got rid of the annuity, he would let the goods remain on the premises; and that the goods being allowed to remain in the possession and visible ownership of *Eastman*, were liable to the execution sent in by the defendant: and the case of *Lingham v. Biggs*,

v. Biggs, 1 *Bos. & Pull.* 82. was cited in confirmation of this position.

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On the other side, the cases of *Kidd v. Rawlinson*, 3 *Esp.* 52. 2 *Bos. & Pull.* 59. and *Leonard v. Baker*, 1 *M. & S.* 251. were cited, to shew, that the circumstance of *Eastman's* being allowed to remain in possession, did not render the goods liable to the execution.

LORD ELLENBOROUGH. — I had supposed that evidence would have been given of some collusion on the part of *Pearson*, the landlord, with the plaintiff; but nothing of this kind appears. The plaintiffs acquired a property in the goods by purchasing them at the sale under the distress. *Guthrie*, as a trustee, was not on that account precluded from becoming a purchaser; he purchased them as any other person might have done; and though he had taken the money with which he purchased them from the strong box of another, that would not have vitiated the sale. His motive for buying was, that the goods might not be removed from the premises, but might remain there for the benefit of the creditors, and he was quite at liberty if he chose to leave *Eastman* in the possession. The doctrine of possession applies to cases of conveyance from the party himself. The statute of *Eliz.* does not apply to a case like this, where the property is sold not by the party, but under a distress for rent. I had supposed that an attempt would have been made to shew that the

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 and Another
 v.
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distress was merely colourable and fraudulent, and that the landlord had been induced to act merely in favour of *Eastman* or the creditors; but this does not appear. *Guthrie* became the purchaser at the sale as any other person might have been, and it was at his option to take the goods or leave them; he was the legal proprietor, and *Wood* had no right to take them in execution.

Verdict for the plaintiffs.

Scarlett and *Spankie* for the plaintiffs.

Marryatt and *Comyn* for the defendant.

See *Edwards v. Harben*, 2 T. R. 587. *Wordall v. Smith*, 1 Camp. 332. *Holbird v. Anderson*, 5 T. R. 235. *Estwick v. Cailland*, 5 T. R. 420. *Dewey v. Baynton*, 6 East, 257. *Meux v. Howell*, 4 East, 1.

FLEMING v. HAYNE.

A bankrupt having obtained his certificate is not liable upon a promise to pay a former debt, unless it be express, distinct, and unequivocal.

THE question in this case was, whether the defendant, who was a certificated bankrupt, had by a subsequent promise, rendered himself liable to a debt which would otherwise have been barred by the certificate.

The declaration was upon a general *indebitatus assumpsit*.

The

The defendant obtained his certificate on the 4th of *April*, 1816. On the 6th of *April*, upon application made to him for payment by the nephew of the plaintiff, he said that he was unable to pay the debt, but that if the plaintiff would wait, he would pay the debt in two instalments. It did not appear that this proposal had been acceded to. On the 20th of *April*, another application having been made, he admitted that he had before agreed to pay 15*l.* in satisfaction of the debt; but said, that as he had obtained his certificate, he would not pay that sum unless he was compelled by law.

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Lord ELLENBOROUGH, in summing up to the Jury, observed — The admission which the defendant made on the 20th was not a promise to pay the debt, but is evidence of an antecedent agreement to pay the sum of 15*l.*; and the refusal to pay, because he had then obtained his certificate, imported that the agreement to pay was previous to the certificate. You ought to be satisfied that the defendant made a distinct, unequivocal promise to pay, before he is to be placed again in the responsible situation from which the law has discharged him. The promise in this declaration is stated unconditionally, but if the defendant promised conditionally only, he cannot become liable until the terms of the condition have been performed. If you think the defendant, being under no legal obligation to pay the debt, but contemplating his legal and moral situation, deliberately

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berately promised to pay the debt, the plaintiff will be entitled to your verdict, otherwise you ought to find for the defendant.

Verdict for the defendant.

Topping and *E. Lawes* for the plaintiff.

Garrow, A. G. and *Campbell* for the defendant.

See Besford v. Saunders, 2 H. B. 116.

ROBSON v. ANDRADE.

A having deposited with B 100*l.* to distribute amongst A's creditors in proportion to their claims, no one of these can maintain an action against B before the proportions of all the claimants have been ascertained.

A's declaration in such case is evidence to shew that C is a creditor of his to a specific amount.

THIS was an action of assumpsit, for money had and received to the plaintiff's use.

It appeared that *Goldham* had paid into the hands of the defendant the sum of 100*l.*, to be divided amongst his creditors, (at the subscription-rooms) of whom the plaintiff was one. It also appeared that *Goldham* had specified the plaintiff and two others as being his creditors for particular sums.

Garrow, A. G. for the defendant, contended that the declaration of *Goldham* on the subject, was not evidence for the purpose of shewing that the persons specified were entitled to the 100*l.* But

Lord

Lord ELLENBOROUGH was of opinion, that the declaration of *Goldham* was evidence to shew that the plaintiff was entitled as a creditor, but that it would not preclude the defendant from shewing that there were other creditors; and that if it appeared that there were three creditors only whose claims had been ascertained, the plaintiff would be entitled to recover his *ascertained definite aliquot* part of the 100*l*.

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It afterwards appeared that there were other creditors, *Jacobs* and *Davies*, and that the claim of the latter did not exceed 10*l*., nor that of the former 100*l*., but that no adjustment had been made, and that the precise amount remained unascertained.

Scarlett for the plaintiff contended, that at all events he was entitled to a verdict for something, since though the precise amount of the plaintiff's share remained unascertained, the jury, under the circumstances, might give a sum to which at the least the plaintiff would be entitled.

Lord ELLENBOROUGH. — The defendant cannot be called upon to pay a sum which has not been ascertained, and before he has adjudicated on the claims upon the fund entrusted to him. As long as there were but three claimants in the field, the amount of whose claims had been ascertained, I was with you. The plaintiff must be called.

Plaintiff nonsuited.

Scarlett

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ROBSON.

v.

ANDRADE.

Scarlett and — for the plaintiff.*Garrow*, A. G. for the defendant.

In the ensuing term, *Scarlett* moved for a new trial, on the ground that having proved the plaintiff to be a claimant to a specific amount, it was incumbent on the defendant to shew how much was due to other claimants in diminution of the plaintiff's demand; but the Court held, that previous to an adjustment of the claims of the various creditors, no action could be maintained.

Rule refused.

BREMBRIDGE v. OSBORNE.

Where there is a competition of evidence upon the question whether a security has been satisfied by payment, the possession of that security by the claimant ought to turn the scale.

THIS was an action by the indorsee against one of the makers of a joint and several promissory note, for the sum of 102*l.* and a fraction, payable seven months after the date.

The defendant had paid 6*l.* into court, and the defence was, that the remainder had been paid to *Thorowgood*, the payee.

In summing up to the jury, his Lordship observed, that where there is a competition of evidence on the question, whether a security has or has not been satisfied by payment, the possession of the

the uncanceled security by the claimant ought to turn the scale in his favour, since in the ordinary course of dealing, the security is given up to the party who pays it.

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BREMBRIDGE
v.
OSBORNE.

Verdict for the defendant.

Garrow, A. G. and Marryatt for the plaintiff.

Topping and Chitty for the defendant.

WRIGHTSON and Another v. PULLAN and Another.

THIS was an action by the plaintiffs, as the indorsees, against the defendants, as the acceptors of a bill of exchange, dated *Feb. 1st, 1815*, for the payment of 850*l.*

After the actual dissolution of a partnership between A and B, A accepts a bill in the name of the partnership, bearing date before the dissolution, an indorsee who takes the bill without notice of the dissolution cannot enforce the bill against B.

It appeared that the bill was drawn by *Taylor and Son*, payable to their own order, and accepted by *Hopcroft*, one of the defendants, in the name of himself and his partner, and indorsed by *Taylor and Co.* to the plaintiffs for value. The defence was, that after the date of the bill, but before it had actually been drawn, the partnership between *Pullan* and *Hopcroft* had been dissolved. The dissolution took place on the 13th of *Feb. 1815*, and had been published in the *Gazette* on the 14th of *Feb.* and after this the bill had been delivered

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and Another

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and Another.

Topping for the plaintiffs contended, that they were entitled to recover, since they had taken the bill dated before the dissolution for value, and without any notice of the dissolution. — But

Lord ELLENBOROUGH was of opinion that since the partnership had actually been dissolved before the drawing of the bill, *Pullan* could not be charged by the subsequent act of *Hopcroft*.

Verdict for the defendant.

In the ensuing term, *Topping* moved for a new trial, but the rule was refused, and a distinction was taken between the present case and the case of goods supplied after a dissolution of partnership, but without notice, by one who has been in the habit of supplying goods to a firm.

See *Kilgour v. Finlayson*, 1 H. B. 155. *M'Iver v. Humble*, 16 East, 169. *Henderson v. Smith and Wild*, 2 Camp. 561. *Usher v. Dauncey*, 4 Camp. 97.

DAVIS v. NOAK.

1816.

THIS was an action on the case for a malicious prosecution.

A declaration in an action for a malicious prosecution, which alleges that the defendant charged the plaintiff with felony, is supported by evidence that the defendant stated to the magistrate that he had been robbed of specific articles, and that he suspected and believed and had good reason to suspect and believe that the plaintiff had stolen them.

The declaration contained two counts: in the first it was alleged, that the defendant went before —*Gifford*, a magistrate, and falsely, maliciously, and without any reasonable or probable cause, charged the plaintiff with having feloniously stolen a diamond pin, a silver fruit knife, &c. and other articles, the property of the defendant, in his dwelling-house, and caused and procured the said *Gifford* to issue his warrant, &c. The second count alleged, that the defendant, falsely and maliciously, and without any reasonable or probable cause, caused the plaintiff to be charged with an offence, punishable by law, to wit, felony, &c.

It appeared that the plaintiff had served the defendant in the capacity of butler, and had afterwards caused him to be arrested for a debt due to him. After the arrest, the defendant laid an information before Mr. *Gifford*, the magistrate, which was produced, and in which he stated, that two months ago, his secretaire had been broken open, and a large diamond pin, a silver fruit knife, and other articles, his property, had been feloniously stolen, and that he suspected and believed, and had good reason

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reason to suspect and believe, that the same had been feloniously stolen by the said *Davis*.

Upon this information, a warrant was granted, and the defendant was called upon by Sir *William Parsons*, before whom the plaintiff was brought, by virtue of the warrant, to make good *his charge*, but the complaint was ultimately dismissed.

Garrow, A. G. on the part of the defendant, objected, that the declaration had not been sufficiently proved; it alleged an express charge of felony, but upon the evidence, it appeared that the defendant had only expressed his suspicion and belief, that the plaintiff had committed the felony. He merely suggested to the magistrate the circumstances which engendered the suspicion in his mind, leaving the magistrate to act according to his own discretion: but

Lord ELLENBOROUGH was of opinion, that the averments in the declaration had been substantially proved. An application had certainly been made by the defendant for the apprehension of the plaintiff, and a warrant would have been granted in either case, whether the defendant had sworn positively to the fact, or had sworn to his belief only; he could not have sworn that he *knew* the charge to be true, unless he had been an eye witness to the fact, or the party had confessed it.

Verdict for the plaintiff.

Topping

Topping and *Espinasse* for the plaintiff.

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Garrow, A. G. and *E. Lawes* for the defendant.

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A rule *nisi* for a new trial having been obtained in the subsequent term, *Topping* and *Espinasse* afterwards shewed cause against it. They contended, that since this was an action on the case, those allegations only which were material were put in issue by the plea of the general issue not guilty; and that in the present case the grievance was, the maliciously causing a warrant to be issued without probable cause, and that whether that was effected by a charge of suspicion, or of actual felony, was not material. And they referred to the cases of *Winn v. White*, 2 Bla. Rep. 840. *Waites v. Briggs*, 2 Salk. 565. and *Roberts v. Price*, 1 Lord Raym. 702. But that at all events, the plaintiff was entitled to retain his verdict on the second count, since the word felony under the *videlicet*, might be rejected as surplusage.

But the Court were clearly of opinion, that the word felony could not be rejected, since then there would be no charge at all.

Garrow, A. G. and *E. Lawes* for the defendant, insisted, that he had done nothing more than state certain facts, from which he inferred a belief of the commission of a felony by the plaintiff, leaving the magistrate to act upon it according to his discretion: and also that the allegation upon the record,

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record, required specific proof, as in an action for words.

LORD ELLENBOROUGH. — I am at an utter loss for the meaning of the word charge, as used in the declaration, if it is not satisfied by the statement made by the defendant. The question is what in common parlance that statement amounts to. The magistrate calls it a charge. Is it not a statement to a common intent, that the plaintiff stole the property? No one could state, without having seen it with his own eyes, that the party had actually stolen the property. He informed the magistrate that his secretaire had been broken open, and that he had discovered that a diamond pin and other articles, had been feloniously stolen, the *corpus delicti* therefore was stated; he then went on to say, as every one who had not been an eye witness must have done, that he believed that *Davis*, who had been his servant, had stolen them. The accusation could not have been more direct, unless he had seen the very act. The magistrate uses the words to make good the *charge*, he therefore conceived it to be a charge, and in common parlance what is it else. What could a magistrate, under the circumstances, do, but issue his warrant? The only question is, whether to a common intent, this is not a charge; it is not indeed such a technical description of a crime, as to bring it within the words of the statute, but it is a statement of strong reason on the part of the defendant, to believe that the plaintiff had stolen his property.

BAYLEY,

BAYLEY, J. — My present impression is, that there is a material variance between the declaration and the evidence adduced to support it. The injury which results from a charge of this nature is partly to character. A party may make either that which he knows, or that which he suspects, the foundation of his charge, and there is a great difference whether the information be so laid as to import that he proceeds upon actual knowledge or on suspicion only. There is a material difference in this respect as to the evidence to be produced upon the trial. If he has pledged his knowledge of the fact, he engages to prove such knowledge upon the trial; if suspicion only, then such circumstances as shall justify that suspicion. Suppose the defendant were bound to plead his defence specially, would it be sufficient in his justification to set forth such circumstances as shewed that he had not actual knowledge, but only reasonable ground to suspect and believe. The allegation is, that without any reasonable or probable cause, he charged the plaintiff with having feloniously stolen. He might have seen the act, have traced the property, and found it in the possession of the plaintiff; or on making the charge, the latter might have confessed it, and in such cases he might have stated in an unqualified manner, that the plaintiff had stolen the property. Upon a *Habeas Corpus*, there is a great difference between a commitment upon a direct charge, and one upon mere suspicion. Looking at the words of the declaration, they import, that the defendant made a charge as upon

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his own actual knowledge; but the information imports nothing more than that the defendant suspected and believed. If this applies to the first count, it applies also to the second, which cannot be distinguished from the first, and imports a general and not a qualified charge. If I am mistaken as to the meaning of the allegation as virtually implying knowledge on the part of the defendant, then these observations fall to the ground; but I am bound to state my present impression on the subject.

ABBOTT, J. — I am of opinion that the declaration was supported by the evidence. The action is not founded upon words only, but upon acts done. The preferring a charge of felony is synonymous with an accusation of having feloniously stolen. The evidence to support this is the information before the magistrate, which contains in substance an assertion that a felony had been committed, and that the defendant had good cause to suspect and believe that *Davis* had stolen the property, which according to the common understanding of mankind, and as it was understood by the magistrate, amounts to a charge of felony against the plaintiff, and is therefore sufficient to sustain the allegation.

The words *crimen felonix imposuit* have often been translated, “*imputed the crime of felony* ;” but they mean, “made a charge of felony,” and it has been held that they are not supported by
proof

proof of mere words without going before a magistrate, and preferring *crimen*, i. e. a charge of felony, without reference to the precise mode.

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HOLROYD, J. — I am also of opinion that the declaration is supported. This is not an allegation of the particulars of the charge, either written or oral, preferred by the defendant. — The defendant expressly states his opinion, that the felony has been committed by his servant, the plaintiff. He applies to the magistrate for the purpose of obtaining a warrant against some one, but he does not state the facts upon which his opinion is founded to enable the magistrate to act according to his discretion, but says, that he suspects and believes, and has good cause to suspect and believe, that the felony was committed by the plaintiff. He not only states his suspicion, but goes on to assert, that he has good reason for entertaining it. This amounts to an accusation, and on these grounds I am of opinion that the allegation is proved. Both counts stand on the same footing, since they both allege a charge of felony.

See *Leigh v. Webb*, 3 Esp. 165.

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BLUETT v. OSBORNE and Another.

A sells to B a bowsprit which at the time of sale appears to be perfectly sound, but which, after being used some time, turns out to be rotten : in the absence of fraud A is entitled to recover from B what the bowsprit was apparently worth at the time of delivery.

THIS was an action of assumpsit, for goods sold and delivered.

The question was as to the price of a bowsprit supplied by the plaintiff to the defendants. No specific price had been stipulated for ; the vessel sailed, and upon her arrival at Madeira, the bowsprit, upon being cut up, was found to be rotten. The defendants had had an opportunity of inspecting the bowsprit, which appeared, at the time of delivery, to be in every respect good and perfect.

It was contended for the defendants, that they were not liable to more than the real value of the bowsprit; and the case of *Farnesworth v. Garrard*, 1 Camp. 38. was referred to. And that there was an implied warranty on the part of the vendor, that the article should be made of good and sufficient materials.

LORD ELLENBOROUGH. — A person who sells, impliedly warrants, that the thing sold shall answer the purpose for which it is sold ; in this case the bowsprit was apparently good, and the defendants had an opportunity of inspecting it. No fraud is complained of, but the bowsprit turned out, to be defective

defective upon cutting it up. I think the plaintiff is not liable on account of the subsequent failure. In the case cited, what the plaintiff deserved, was the value of the building; what he deserves here, is the apparent value of the article at the time of delivery: Supposing the price to have been paid on delivery, could it have been recovered back?

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 BLUETT
 v.
 OSBORNE
 and Another.

Verdict for the plaintiff, damages 60/.

Garrow, A. G. and — for the plaintiff.

Jervis and *Barnwell* for the defendant.

In the ensuing term the court refused a rule *Nisi* for a new trial.

See *Havelocke v. Geddes*, 10 East, 555. *Davidson v. Gwynne*, 12 East, 381, and *Okell v. Smith*, *supra*, 107.

LOWES and Others *v.* MAZZAREDO and Others.

THIS was an action by the plaintiffs, as the indorsees against the defendants, as the acceptors of a bill of exchange, dated 28th March 1814, drawn by *G. Lowes* on the defendants, for the sum of 1000/., payable two months after date, to his own order, a *bona fide* holder cannot afterwards recover upon it against the acceptor

The payee of a bill of exchange indorses it upon an usurious contract at the time of the contract,

D D 3

order,

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 LOWES
 and Others
 v.
 MAZZAR-
 REDO
 and Others.

order, indorsed by *G. Lowes* to Sir *M. Bloxham*, by the latter to *Ambrose*, and by *Ambrose* to the plaintiffs.

The defence was, usury committed upon the indorsement of the bill, by *G. Lowes* to Sir *M. Bloxham*, and by the plaintiffs, on taking the bill by indorsement from *Ambrose*.

It appeared, that *G. Lowes*, on the 1st of *April*, took the bill to Sir *M. Bloxham*, to get it discounted, and that the latter agreed to do it, on receiving one half *per cent.* commission, and 5 *per cent.* as loss incurred by selling out stock. *G. Lowes* acceded to these terms, and the bill was indorsed at the time of the transaction. It also appeared, that the plaintiffs, upon the indorsement to them, had received one-fourth *per cent.* besides commission, as brokers: this however, it was contended, was divided between the plaintiffs, who were brokers at *Liverpool*, and their *London* agents; and was no more than an adequate remuneration for the expences of carriage, &c.

Lord ELLENBOROUGH was of opinion, that the plaintiffs were not entitled to recover on the bill, since they were obliged to claim through an indorsement which had been vitiated by usury; but upon the counsel for the plaintiffs insisting strongly on the case of *Parr v. Eliason*, 1 *East*, 92. his Lordship permitted the plaintiffs to take a verdict, subject to a motion to enter a nonsuit.

A rule

A rule *nisi* having been obtained to that effect in the ensuing term, *Scarlett* and *Littledale* afterwards shewed cause against it. They relied mainly on the case of *Parr v. Eliason*, 1 *East*, 92, and upon the doctrine there expounded by Lord *Kenyon*. They argued, that although the statute avoided the indorsement to Sir *M. Bloxham*, on the ground of usury, yet that it did not wholly nullify the indorsement to the exclusion of the claim of an innocent holder. That every subsequent holder was in privity with an indorsement once made, and might claim immediately from the indorser. The property on the indorsement by *G. Lowes*, resided in some one, and if it did not pass to *Bloxham*, it remained in *G. Lowes*, and he might have brought his action upon it, or by indorsement have transferred his interest in the bill : suppose then that he had taken the bill back from Sir *M. B.* might he not have put it into the hands of another, and so have transferred the interest which he had, but if he could, then in the present case, the interest had been transferred, since the holder is in privity with the first indorser, and the intermediate transaction is immaterial. The case of *Daniel v. Cartony*, 1 *Esp.* 274. was also cited, to shew that where the bill is good in its inception, an intermediate usurious transaction will not prevent an innocent holder from recovering, and it was urged, that the Court would not be willing to extend the doctrine expounded in *Lowe v. Waller*, *Doug.* 736. which was contrary to previous decisions on the subject. And that as to the *per centage* taken by

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1816. the plaintiffs, it was no more than an adequate remuneration for the expences of carriage, &c. and that at all events it was a question for the jury, whether the transaction was usurious.

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and Others.

But the Court were of opinion that the case of *Parr v. Eliason*, was distinguishable from this, and might be supported upon other grounds, and that the indorsement was entirely avoided by the statute of usury, and could not be dismissed for one purpose, and retained for another; and that after the case of *Lowe v. Waller* had been acted upon so long, its foundation could not now be inquired into. The Court were also of opinion that the indorsement to the plaintiffs was also infected with usury; and the rule for entering a nonsuit was made absolute.

Scarlett and Littledale for the plaintiffs.

Topping for the defendants.

MORELAND v. LEIGH and Another.

An action on the case does not lie against a sheriff (who

THIS was an action against the defendants, as sheriffs of *London*.

has not been ruled to return the writ) for neglecting to have the money in court according to the exigency of a *feri facias*.

The

The declaration stated, that the plaintiff had recovered a debt against *A. B.* and sued out a *fi. fa.* which was delivered to defendants, the sheriffs, to be executed; the first count averred, that the defendants forbore to levy when they might have levied, and had not the money, &c.; the second averred, that the defendants had levied, but had not the money, &c.

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 v.
 LEIGH
 and Another.

Lord ELLENBOROUGH was of opinion, that this was not such a default as laid the foundation of an action. The sheriffs should have been ruled to return the writ, which the Court would have required to be a *legal* return, and if *false*, the plaintiff then would have been entitled to his action.

Plaintiff nonsuited. (a)

Topping and *Curwood* for the plaintiff.

Spankie for the defendant.

(a) I am indebted to a friend for his note of the above case.

Regularly an action on the case does not lie against the sheriff for not returning a writ without other default, for he shall be amerced, *Semb. 2 Inst. 452.* and *Com. Dig. Return. F. 1.* But it is otherwise where the plaintiff delivers his writ to the sheriff in full county, according to the provisions of the st. *West. 2. 13 Ed. 1. c. 39.* — *2 Inst. 452.* and see the st. 20 G. 2. c. 37.

A sheriff having returned to a writ of *Fi. Fa.* that he has seized and sold part, and that the residue remains in his hands for want of buyers may shew, upon an action brought for not having the money in court, &c. that the goods were in fact the property of the assignees of the defendant who had become a bankrupt.

BRYDGES and Another v. WALFORD.

THIS was an action against the sheriff of Essex, tried at the *Essex Summer Assizes*, 1816. —

The declaration alleged, that the plaintiffs' having obtained judgment against *William Collen* for a debt of

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 BRYDGES
 and Another
 v.
 WALFORD.

of 3000*l.*, sued out a *feri facias*, &c., whereupon the defendant returned that he had levied on goods to the amount which remained in his hands for want of buyers, whereupon the plaintiffs sued out a *venditioni exponas*. upon which the defendant returned, that he had sold goods to the amount of 1000*l.*, but that the residue remained in his hands for want of buyers. The declaration then alleged, that the defendant had not the money so levied before our said Lord the King at *Westminster*, &c.; but that contrary to his duty as such sheriff he had paid the sum so levied, and delivered the goods so seized to divers persons unknown.

The plaintiffs were judgment creditors of *Collen's*, upon a judgment signed Oct. 4. 1815. On the 10th of October a *feri facias* was delivered to the sheriff, who seized goods to the amount. On the 20th of November the sheriff returned, that he had levied, and that the goods remained in his hands for want of buyers. On the 23d of November the plaintiffs sued out a writ of *venditioni exponas*. In Hilary Term, 1816, the sheriff returned, that he had sold part, and that the residue remained in his hands for want of buyers. A commission of bankruptcy was sued out against *Collen*, Feb. 1816. It was contended on the part of the plaintiffs, that the defendant was precluded by his return from adducing evidence to shew that the

goods were the property of *Collen's* assignees. That it was the duty of the sheriff to sell the goods, and that he could not, after returning that he had sold them, pay over the product to the assignees. On the part of the defendant the above case was cited.

BURROUGH, J. admitted evidence to shew that the plaintiffs knew that *Collen* (who had committed an act of bankruptcy at the time of the execution) was insolvent. The defendant had a verdict with leave to the plaintiffs to move to enter a verdict.

A rule nisi having been obtained to that effect, *Gurney* and *V. Laaves* contended, that the sheriff's return was conclusive upon him. It had been held, that the acts of the sheriff were binding on third persons *à fortiori*, they were conclusive against himself; and that the proper course for the sheriff was to apply to the Court to permit him to amend his return.

LORD ELLENBOROUGH. — The sheriff is not supposed to be omniscient, he did what was right at the time, but when he found that he was not justified in what he had done, he was not to proceed to all lengths. If you had received the money from the sheriff, you must have repaid it to the assignees. The claim is against both law and morals.

The other judges being of the same opinion,

The Rule was discharged.

COURT OF COMMON PLEAS.

SITTINGS IN LONDON.

LUCAS and Others, Assignees of BOURMAN, v. 1816.
 GRONING and Others.

THIS was an action brought by the plaintiffs, as the assignees of *Bourman*, a bankrupt, to recover 1600*l.* as the balance of an account with the bankrupt.

Bourman had consigned goods to *Groning* and Co. at *Hamburgh* for sale, under a *del credere* commission, and being desirous of obtaining advances of money, *Groning* in *London* agreed to make such advances, for which it was stipulated that he was to be repaid out of the proceeds of the consignments. *Groning* and Co., of *Hamburgh*, had transmitted bills to the amount of 1600*l.* to *Groning* in *London*. These were drawn by *Leman* on *Levy* and Co., and were transmitted to *Groning* in *London*, and specially indorsed to him. *Groning* and Co. wrote to *Bourman*, to inform him of the sale of the sugars, and of the purchase of bills on his account, which they requested him to note in conformity when duly honoured. The bills were not paid over to *Bourman* before his bankruptcy, but remained in the hands of *Groning*, in *London*, till they were dishonoured; and the question was, whether *Bourman's* assignees, or *Groning* and Co. were to bear the loss upon these bills.

A in *London* consigns goods to the firm of B and C at *Hamburgh* for sale upon a *del credere* commission, B in *London* makes advances to A to be repaid out of the proceeds — B and C with the proceeds purchase bills for A which they transmit to B in *London*, specially indorsed to him, and these bills, whilst they are in B's hands, are dishonoured. B and C must bear the loss.

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 and Others
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GIBBS, C. J. — The question here is, whether certain bills, which turn out to be unproductive, were at the risk of *Bourman* or of the defendants. *Bourman* being desirous of selling goods at *Hamburgh*, consigns them to the house of *Groning* and Co. at *Hamburgh*, to be sold on a *del credere* commission, and wishing to obtain advances on account of these goods, an agreement is entered into, by which it is stipulated that *Groning*, in *London*, shall make advances in *London* to *Bourman*, and that he shall be repaid out of the proceeds of the consignments. There is no stipulation for any particular mode of remittance, but merely that the proceeds shall be set against the advances by *Groning*. The whole of the balance on the side of the proceeds is accounted for, except 1600*l.*; and therefore the whole question is, upon whose account the bills are to stand, no direction having been given to purchase goods, or to remit the balance in any particular way. — Supposing the agreement to be silent on the subject, as soon as the agent is in cash by the sale of the consignments, he is answerable for the amount, and cannot dispose of it without authority, and the mode of disposal is at his own risk, and he need not pay it over till he is called upon.

After commenting upon all the facts of the case, his Lordship added: — The question is, whether there grows out of this transaction a right on the part of *Groning* and Co. to send bills not at their own risk, but at that of *Bourman*. It has been suggested, that what *Groning* and Co. did at *Hamburgh*,

burgh, and what *Groning* did here, was done in two different capacities; that what was done at *Hamburgh* was done for the house, but what was done here, was done by *Groning* in his own individual capacity; you are to judge of the effect of this.

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 LUCAS
 and Others
 v.
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 and Others.

The jury, which was a special jury of merchants, found a verdict for the plaintiffs.

Lens and *Vaughan*, Serjeants, and *Campbell* for the plaintiffs.

Shepherd and *Best*, Serjeants, and *Richardson* for the defendants.

YORK SUMMER ASSIZES.

REX v. the Inhabitants of ECCLESFIELD.

THIS was an indictment against the inhabitants of the parish of *Ecclesfield*, for the non-repair of a road within the parish.

The defendants, after pleading prescriptive obligations under which different districts and divisions were bound to repair different parts of the road in question, with respect to the residue, alleged, that the inhabitants of a certain district one common highway within the said district, the plea may be supported, although it appear that the excepted highway is of recent date.

In such a plea it is unnecessary to state by whom the excepted highway is repairable.

OR

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v.

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FIELD.

or division in the parish of *Ecclesfield*, called *Wadsley*, from time whereof the memory of man is not to the contrary, have repaired and amended, and have been used and accustomed to repair and amend, and of right ought to have repaired and amended, and still of right ought to repair and amend, when and so often as it hath been or shall be necessary, such and so many of the common highways, situate in the said district or division of *Wadsley*, as would otherwise be repairable and amendable by the inhabitants of the said parish at large, *save and except a certain common highway in the said district or division of Wadsley*, being another and different common highway from the other parts of the said common highway in the indictment mentioned to be ruinous, &c. ; and that the residue of the said common highway so alleged to be ruinous, &c., now is, and during all the time when the same is alleged to be ruinous, &c., hath been situate in the said district or division, in the said parish of *Ecclesfield*, called *Wadsley*, and would, but for the said prescription or usage, be repairable and amendable by the inhabitants of the said parish at large, and that by reason of the premises, the inhabitants of the said district or division of *Wadsley*, during all the time last aforesaid, ought to have repaired and amended, and still ought to repair and amend, the said residue, &c.

It appeared in evidence, that the road excepted in the plea was not an ancient road, but had been formed about twenty-five years ago, by the commissioners under an inclosure act.

It

It was objected on behalf of the prosecution, that the defendants, under the plea as it was framed, were bound to shew that the excepted road had existed immemorially, since it was pleaded as an exception to an immemorial obligation, and could not have been an exception unless it had existed immemorially. But

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FIELD.

WOOD, Baron, was of opinion, that the plea was supported by the evidence, although the exception might have been stated more explicitly.

Verdict for the defendants.

Raine, Richardson, and Williams for the prosecution.

Scarlett and Littledale for the defendants.

In the ensuing term, *Williams* moved for judgment for the Crown, *non obstante veredicto*, on the ground that the plea did not state how the road, which formed an exception to the prescription, was to be repaired, whether by the inhabitants of the district, or by some individual *ratione tenuræ*. But the Court held that it was not material to allege by whom the excepted road ought to be repaired. (a)

(a) The court granted a rule *nisi* upon another ground.

1816.

REX. v. RUSHWORTH.

A forged order for the purpose of obtaining a reward for the apprehension, &c. of a vagrant is not a forgery within the st. 7 G. 2. c. 22, unless it contain the requisites prescribed by the st. 17 G. 2. c. 5. s. 5, although it is drawn in the same form as orders in that county usually have been drawn.

THIS was an indictment against the prisoner under the statute 7 G. 2. c. 22. which charged the prisoner with forging, and also in other counts with uttering, knowing it to be forged, an order on the treasurer of the West Riding of the county of *York*, for the payment of money. The order was set out as follows :

“West Riding
of Yorkshire,
to wit.

} “ To the Treasurer of the said Riding.

“ Pay unto the constable of *Stanley*, in the said
“ Riding, or his order, the sum of four pounds ten
“ shillings for apprehending and conveying to the
“ House of Correction, at *Wakefield*, the bodies of
“ *James Wood, Mary Wood, Thomas Hall, Ann*
“ *Hall, Mary Ellis, John Bentley, Hannah Bentley,*
“ *Richard Jones, and Mary Jones*, as vagrants,
“ committed by me 7th day of *February*, and six-
“ pence for this order. Given under my *hand* this
“ 23d day of *March*, 1816.

4l. 10s. 6d.

“ J. TAYLOR.”

By the st. 17 G. 2. c. 5. s. 5. it is enacted, that
“ If any constable, &c. shall so apprehend and con-
“ vey such rogue or vagabond, it shall and may be
“ lawful for such justice or justices to reward any
“ such

“such constable or other person, by making an
 “order, *under hand and seal*, upon the high or
 “chief constable, to pay the sum of 10s. to the
 “person so apprehending him or her within one
 “week after demand and producing such order, and
 “upon his giving a receipt for the same; and the
 “same shall be allowed or paid by the treasurer of
 “the county, riding, division or liberty, to such
 “high or chief constable, on his passing his ac-
 “counts and delivering such order and receipt, and
 “also his own receipt for the same, to such trea-
 “surer, and the said justices at the general or
 “quarter sessions shall allow the same to the trea-
 “surer in his accounts, upon his producing and
 “delivering up the vouchers aforesaid.”

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Evidence was adduced on the part of the prosecution, to shew that in the West Riding of the county of *York*, it had been customary to make orders in a form similar to that of the order stated in the indictment, and that orders in that form had been constantly paid by the treasurer.

Williams and *Starkie* for the prisoner, objected that the order in question was not an order for the payment of money within the scope of the statute 17 G. 2. c. 5. s. 5. since, in the first place, it did not purport to be under seal, and was not directed to the high constable of the Riding as the act required; and that therefore the requisites of the act not having been complied with, the instrument, supposing it to have been genuine, would have been

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perfectly

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perfectly inoperative. The defect was not merely a collateral one, but was to be found in the frame and structure of the instrument itself. Then supposing the stat. 17 G. 2. to be out of the question, the case could not fall within the stat. 2 G. 2., since it was nothing more than an order by Mr. *Taylor*, the magistrate, on Mr. *Lee*, the county treasurer, for the payment of a sum of money over which Mr. *Taylor* had no controul or dominion whatsoever. The only means by which the order could be considered as obligatory, was the stat. 17 G. 2. and the requisites of that statute not having been complied with, the order, supposing it to have been genuine, would have been perfectly nugatory.

Heywood, Maude, and Richardson for the Crown, contended, principally, that since orders in the form of the order in question had been generally drawn and acted upon in the West Riding, it was not essential to bring the prisoner within the statute that the order should comply with the requisites of the statute 17 G. 2. c. 5.; it was sufficient that it pursued the usual form, and was therefore capable of being the instrument of fraud. It was in fact an order for the payment of money within the stat. 2 G. 2.; although it did not strictly pursue the form prescribed by the st. 17 G. 2.

BAYLEY, J.—To bring the case within the statute, the order must be such as on the face of it imports to be made by a person who has a disposing power over the funds. In this case, the party looking at
 the

the act, must have known that the order was not made by one who had a disposing power over the funds in his hands. Mr. *Taylor*, as an individual, had no right to make such an order, and the treasurer had no right to consider it as an order which he was bound to obey. Mr. *Taylor*, in his character of a justice of the peace, had no authority to make such an order ; if he had any it was derived from the statute, but he had no power to make such an order as this, and if such a one had been made, the treasurer ought not to have obeyed it.

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 v.
 RUSHWORTH.

The prisoner was accordingly acquitted on this and another similar indictment (*a*).

Heywood, Maude, and Richardson, for the prosecution.

Williams and Starkie for the prisoner.

(*a*) See *Lockett's case*, Leach, C. C. L. 110, 3d Ed. *Mary Mitchell's case*, ib. in not. *Williams's case*, ib. 134. *R. v. Moffatt*, ib. 483. *Clinch's case*, ib. 611. *Rushworth's case* differs from most of those decided upon the st. 2 G 2. c. 22. in this respect, that the order was made in the form in which such orders had usually been made within the West Riding of the county of York; but the same principle applies, since the treasurer was under no obligation to obey such an order.

1816.

WRIGHT QUI TAM v. HORTON.

In a qui tam
action the court
will after

verdict direct a
similiter to be
entered, al-
though the ob-
jection founded
upon the want
of it was taken
at the trial.

A general
allegation in
an action for a
penalty for
acting as a ma-
gistrate with-
out a qualifica-
tion, following
the words of
the statute,
without spe-
cifying any
particular act,
is good after
verdict.

THIS was a *qui tam* action against the defendant, to recover a penalty of 100*l.* for having acted as a magistrate without a sufficient qualification.

It was objected on the part of the defendant, that the Court could not proceed in the trial of the cause, inasmuch as the similiter was wanting upon the *Nisi Prius* record, which issued from the court of *King's Bench*. But

Wood, Baron, proceeded to try the cause, and the plaintiff had a verdict for the penalty.

Richardson, in the ensuing term, having obtained a rule to arrest the judgment, or to award a new trial, and the plaintiff having obtained a rule *Nisi* for amending the record, by adding the similiter; it was contended on the part of the defendant, that the defect was not cured by any of the statutes of jeofails, since they did not in general extend to penal actions. and therefore that the case of *Harvey v. Peake*, Burr. 1793. was not applicable; and the case of *Heath v. Walker*, Str. 1117. was relied upon, where, upon a similar objection, the Court refused to proceed. The issue in this case agreed with the *Nisi Prius* record, and if the roll was right, but the *Nisi Prius* record wrong, the verdict ought



ought to be set aside, since the Judge had no authority to try the cause ; and it was attempted to distinguish this case from that of an indictment, since there the omission was the act of the officer, but here it was the fault of the plaintiff who brought down the record.

1816.

WRIGHT
v.
HORTON.

But the Court were of opinion that the defect was amendable, and referred to *Sayer v. Peacock, Cowp.* 407. *Rawbone v. Hickman, Str.* 551. and *Harris's case, Cro. J.* 502. which had been cited by *Little-dale* on the other side.

Richardson then objected, that the declaration was faulty, because it alleged generally, that the defendant had acted as a magistrate, without specifying any particular act that he had done, and referred to the cases under the statute of false pretences.

Sed per curiam non allocatur Since the objection is taken after verdict, and the declaration pursues the words of the statute, and even in a penal action, after verdict, what has been generally expressed, is presumed to have been particularly proved, and a verdict will serve in such an action, where it would not in case of an indictment.

Judgment for the plaintiff.

CASES

ARGUED AND DECIDED

AT

NISI PRIUS

IN K. B.

At the Sittings after Michaelmas Term,
57 GEORGE III.

SITTINGS AT WESTMINSTER.

1816.

REX v. PYWELL and Others.

Nov. 29th.

An indictment
will not lie for
a deceitful re-
presentation
and warranty
of the sound-
ness of an
horse.

THIS was an indictment against the defendants for a conspiracy to cheat and defraud General *Maclean*, by selling him an unsound horse.

It appeared that the defendant, *Pywell*, had advertised the sale of horses, undertaking to warrant their soundness. Upon an application by General *Maclean* at *Pywell*'s stables, *Budgery*, another of the defendants, stated to him that he had lived with the owner of a horse which was shewn to him, and that he knew the horse to be perfectly sound, and, as the agent of *Pywell*, he warranted him to be sound. General *Maclean* purchased the horse, and took the following receipt : —

“ Received

“Received of — *Maclean*, Esq., the sum of fifty guineas, for a gelding warranted sound, to be re-
“turned, if not approved of, within a week.”

1816.
}
Rex.
v.
PYWELL
and Others.

It was discovered very soon after the sale, that the animal was nearly worthless. The prosecutors were proceeding to give evidence of the steps taken to return the gelding, when —

Lord ELLENBOROUGH intimated that the case did not assume the shape of a conspiracy; the evidence would not warrant any proceeding beyond that of an action on the warranty, for the breach of a civil contract. If this (he said) were to be considered to be an indictable offence, then instead of all the actions which had been brought on warranties, the defendants ought to have been indicted as cheats. And that no indictment in a case like this could be maintained, without evidence of concert between the parties to effectuate a fraud.

The defendants were accordingly acquitted.

The *Attorney-General* and *Andrews* for the prosecution.

Nolan and *Spankie* for the defendants.

See *Wheatley's case*, 2 Burr. 1127. *Pinkney's case*, East, P. C. 818.
R. v. Muno, 2 Str. 1127. 7 Mod. 815. *R. v. Lara*, 6 T. R. 565.
R. v. Bower, Cowp. 323.

1816.

CHAMPNEYS v. PECK.

Same day.

A bill with an indorsement upon it, "March 4, 1815, delivered a copy to C D," which indorsement is proved to be in the hand writing of a deceased clerk of the plaintiff's, (whose duty it was to have delivered a copy of the bill,) and proved to have existed at the time of the date, is evidence to prove the delivery of the bill.

THIS was an action of assumpsit on an attorney's bill, and the only question was, whether a bill had been delivered according to the provisions of the statute, one month before the action was brought.

The action had been commenced on the 20th of April, 1815. It was proved that *Dawling*, a clerk of the plaintiff's, died in November, 1815; and a bill, containing the items of the business done by the plaintiff for the defendant was produced, upon which were indorsed the words "March 4th, 1815, delivered a copy to Mr. Peck," which were in the hand-writing of *Dawling*.

Lord ELLENBOROUGH was of opinion, that it was not sufficient merely to prove that this indorsement was in the hand-writing of the deceased clerk, without at least showing that the indorsement had an existence cotemporary with the date.

Storks for the plaintiff, then adduced further evidence, to shew that the indorsement existed at the time when, according to its purport, the bill had been delivered; and also to shew, that it was the business of *Dawling* to deliver the bill, and that such

such an indorsement was usually made in the common course of business upon the copy kept.

1816.

CHAMPNEYS

v.

PICK.

Lord ELLENBOROUGH deeming this to be *prima facie* evidence of the due delivery of the bill, the plaintiff had a verdict.

Storks for the plaintiff.

The cause was undefended.

ALDERSON and Another v. CLAY.

Same day.

THIS was an action of assumpsit for goods sold and delivered.

The plaintiffs were manufacturers of leaden pipes, and the action was brought against *Clay*, the defendant, as a member of a society of persons, associated under the name of the *Gosport and Forton Water Works Company*, for the value of leaden pipes supplied to them to the amount of 487*l.* 10*s.*

The plaintiffs proved by oral evidence, that a company existed under the denomination of the

book containing a record of the proceedings of the society produced at the meetings, and open to the inspection of all the members, are admissible in evidence against the defendant after he has been proved to be a member of the society.

In an action against one of several members of a society established under a deed of co-partnership for goods supplied to the society, the defendant may be proved to be a partner by parol evidence without producing the deed. And the entries in a

Gosport

1816.
 ALDERSON
 and Another
 v.
 CLAY.

Gosport and Forton Water-Works Company, and that the defendant was a member of the society, and that *Nicholson*, who was also a member of the society, had given orders by a letter (which was produced and read) to the plaintiffs, to send the leaden pipes in question on account of the company. It was also proved that the defendant, *Clay*, had attended several meetings of the society, and had acted as chairman, and that the course was for the clerk of the society to take minutes of the proceedings which took place at each meeting, and afterwards to enter them in a book, which was submitted to the inspection of the society at the next meeting, when it was laid open on the table, and was accessible to all who attended the meeting. It appeared that the minutes had usually been taken by *Sloper*, the clerk to the society, and had been entered in the book by his clerk, (who was called as a witness,) from time to time. It appeared also, that there was a deed of co-partnership, which was in the hands of *Fisher*, the present clerk; but this deed was not produced.

It was proposed to read entries contained in the book, in order to shew that the order given by *Nicholson* had been authorized by the society, and consequently to establish the liability of the defendant (who had not pleaded in abatement) in the present action.

Scarlett for the defendant, objected, that in order to establish the fact of the defendant's being a

member of the society, the deed of co-partnership, which was in the hands of *Fisher*, ought to have been produced, and that no entry in the book could be read against the defendant, without proof that he had authorised it; and that he could not be bound by entries copied by a clerk in *Sloper's* office, without shewing some authority by him to make such entries, or some recognition of them after they had been made.

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ALDERSON
and Another
v.
CLAY.

LORD ELLENBOROUGH. — It has been proved that the defendant was present at three meetings, and a witness has stated that he is a proprietor; this evidence makes him privy to the acts of the society to which he belongs; and his partnership having been *once* established, a book containing the records of the society, and which it appears was open to the inspection of every member, is evidence against him.

Several entries from the book were then read, from which it fully appeared that the order by *Nicholson* had been authorised by the society.

Verdict for the plaintiffs.

Topping, Marryatt, and Long, for the plaintiffs.

Scarlett and Spankie for the defendant.

IN THE KING'S BENCH.

 GUILDHALL.

1816.

Saturday,
Nov. 30th.

A having repaired a carriage for B, allows him to take it away from time to time; he cannot afterwards detain it for the amount of the repairs: neither can he detain it upon a claim for standage, without an express contract to pay for standage, or unless the owner leaves it upon the premises beyond a reasonable time after notice.

HARTLEY v. HITCHCOCK.

THIS was an action of trover, brought to recover the value of a tilbury.

The defendant was a coach-maker, and the plaintiff had sent his tilbury to him to be repaired. After the repairs had been completed, the tilbury remained, by the permission of the defendant, in his yard, and the plaintiff had frequently taken it out of the yard and returned it. At the expiration of two months the defendant, on the 12th of *October*, refused to permit the plaintiff to take away the tilbury, unless he paid for the standage for two months, at the rate of two shillings per week, and also the amount of the repairs, for which, it was stated, the plaintiff had given a bill of exchange, which would be due on the 23d of *October*. The plaintiff tendered him one shilling and sixpence per week for the standage.

Storks for the defendant, contended that he had a right to detain the tilbury for the repairs, and
also

also for the standage at the rate of two shillings per week, supposing that sum to be no more than a reasonable compensation.

1816.
HARTLEY
v.
HITCHCOCK.

Lord ELLENBOROUGH. — The defendant, after the repairs were completed, relinquished his possession, and could not afterwards detain for the amount of the repairs. With respect to standage, there can be no legal claim for it, without an express contract between the parties, or unless the owner has left his property on the premises beyond a reasonable time, and after notice has been given to him to remove it.

Verdict for the plaintiff.

Bolland for the plaintiff.

Storks for the defendant.

DAX v. WARD.

Monday,
Dec. 2d.

THIS was an action on an attorney's bill, and the ground of defence was negligence.

It is no answer to an action on an attorney's bill for prosecuting a suit for the defendant, that no benefit has

The plaintiff's case having been launched, it appeared on the part of the defendant, that *Wil-*

been derived by the defendant, where the failure does not result wholly from the plaintiff's negligence, but partly from accident.

liamson

1816.

DAX

v.

WARD.

Williamson being indebted to him, he employed the present plaintiff to commence an action. The writ was sued out in a wrong name, and a declaration *de bene esse* having been filed, *Williamson* pleaded in abatement, and the plaintiff replied that he was known by the one name as well as by the other. A person of the name of *Kelly* had been a servant of the present plaintiff's, and it was expected that he would prove an admission on the part of the defendant as to his name, which would establish the plaintiff's case. On the 9th of *December* *Dax* wrote to *Kelly* to procure his attendance in court on the 11th, when the cause was expected to be tried. Neither the plaintiff nor *Kelly* attended on the 11th, when the cause was called on, and a verdict was given against the present defendant.

Scarlett contended, that since the present defendant had derived no benefit from the services of the plaintiff, the latter was not entitled to recover.

LORD ELLENBOROUGH. — There were in this case other circumstances conducing to the loss of the cause, independent of the conduct of the plaintiff; and it would break in upon the general rule to admit this to be a defence to the action. The presence of the attorney upon the trial of the cause would not have been essential, provided the witness had been there. The plaintiff acted under the expectation that the letter would have reached the

the witness, and procured his attendance upon the trial, although, unfortunately, it turned out otherwise.

1816.

DAX

v.

WARD.

Verdict for the plaintiff.

Topping and ——— for the plaintiff.

Scarlett for the defendant.

See *Templer v. McLagblan*, 2 N. R. 136. *Gunter v. Clayton*, 2 Lev. 85. *Johnson v. Alston*, 1 Campb. 176. *Baikie v. Cbandless*, 3 Campb. 17. *Compton v. Cbandless*, 3 Campb. 19.

DOE on the Demise of TAYLOR v. JOHNSON.

Same day.

THIS was an action of ejectment brought on a clause of proviso for re-entry, in case the rent should be twenty-one days in arrear, and there should be no sufficient distress on the premises. A distress was made on the 16th of *October*, and the landlord (the lessor of the plaintiff) continued in possession until the 21st of *October*; the forfeiture for nonpayment accrued on the 20th of *October*, and the demise in the declaration was laid on the 28th.

A lease contains a proviso for re-entry, in case the rent shall be twenty-one days in arrear, and there shall be no sufficient distress on the premises; the landlord, who distrains before the expiration of the twenty-one days, but continues in possession of the distress upon

V. Lawes for the defendant contended, that the lessor of the plaintiff, by continuing in possession of

the premises until after the expiration of twenty-one days, does not thereby waive his right of re-entry.

the

1816. the goods after the 20th, had thereby acknowledged an existing tenancy, and waived the forfeiture.
 }
 DOE
 v.
 JOHNSON.

Campbell for the plaintiff contended, that since there was no sufficient distress on the premises, the breach in nonpayment of rent was a continuing one up to the 28th of *October*, the day of the demise, and that, consequently, the right to re-enter remained entire up to that time.

LORD ELLENBOROUGH. — The only question is, whether by the act of distraining and continuing in possession the forfeiture was waived. (a) A right which had accrued at the time of the distress might have been waived by it, but the party is not estopped by it as to any right which accrued subsequently.

Verdict for the lessor of the plaintiff.

Campbell for the plaintiff.

V. Larwes for the defendant.

(a) See *Zouch* on the demise of *Ward v. Willingale*, 1 H. B. 311, where it was held, that a distress taken for rent accrued subsequently to the expiration of the notice to quit, was a waiver of the notice: but (*semble*) if the distress had been for rent which accrued previous to the time of quitting according to the notice, the notice would not have been waived, *per Wilson, J.* 1 H. Bl. 312. See *Doe v. Batten*, Cowp. 243. *Godright v. Cordwent*, 6 T. R. 219. and 8 T. R. 161. n.

MARTIN v. BELL and Another, Sheriff of
MIDDLESEX.

1816.

Tuesday,
December 3d.

THIS was an action against the defendants as late sheriff of *Middlesex*, for an offence alleged to have been committed under the statutes 23 H. 6. c. 9. and the 32 G. 2. c. 28.

The declaration alleged that the defendants, as sheriff of *Middlesex*, arrested the present plaintiff on a precept directed to them, at the suit of one *Emmott*, and that after arresting the plaintiff, they took from him the sum of fifteen guineas, for giving time till the next day for the execution of a bail bond. The second count charged them with taking and receiving the sum of fifteen guineas for detaining the plaintiff until he found bail, and alleged that the said sum of fifteen guineas was a larger sum than was by law allowed for the cause aforesaid.

Another count charged the defendants with taking and receiving the like sum for arresting and taking the plaintiff.

The declaration contained also many other counts.

shewing, that upon the arrest a bail bond was executed and delivered to the plaintiff, who returned it to the sheriff, upon which the latter made his return of *cepi corpus*.

In order to charge the sheriff with the act of the bailiff in an action for extortion, it is not sufficient to produce a copy of the precept, with the bailiff's name indorsed upon it, although the sheriff has returned *cepi corpus*: the plaintiff in such case must either produce the warrant, or prove some recognition of the act of the bailiff by the sheriff.

But it is not essential in such case to produce the warrant, the privity between the sheriff and the bailiff may be proved, by

It

1816.
 MARTIN
 v.
 BELL
 and Another.

It was stated and proved on the part of the plaintiff, that he had been arrested by *Withers*, a sheriff's officer, upon a bill of *Middlesex*, at the suit of *Walter Emmott*, and taken to a spunging-house. Mr. *Farmer*, a friend of the (present) plaintiff's, was then in the country; and it was agreed upon between the plaintiff, Mr. *Eicke* his solicitor, and *Withers*, that a bail bond should then be executed by the plaintiff and Mr. *Eicke*, and that another bail bond should also be executed by the plaintiff, which was to be afterwards also executed by Mr. *Farmer*; and that upon the execution of the latter bond by Mr. *Farmer*, the former bond should be cancelled. To induce the officer, *Withers*, to accede to this arrangement, the sum of fifteen guineas was paid him by the plaintiff; and upon the taking and receiving of this sum, the present action against the sheriff was founded.

In order to connect the act of *Withers*, the officer, with the sheriff, the plaintiff gave in evidence an examined copy of the precept to the sheriff, with the sheriff's return indorsed upon it. By this precept, the sheriff was commanded to take the body of the plaintiff in the usual form, and the sheriff had made a return of *cepi corpus*. It also appeared from this copy, that the names of *Withers* and *Sheldon* had been written upon the precept. The plaintiff had served the defendants with notice to produce the warrant.

Upon the examination of Mr. *Burchell*, from the sheriff's office, it appeared that it was the usual
 6 course

course to indorse upon every warrant, before it was issued, the name of the officer by whom it was to be executed ; and that the constant practice was, that a warrant, if unexecuted, was returned by the bailiff to the sheriff's office ; but that if the warrant was executed, the bailiff kept it for his own justification, and merely returned to the sheriff a memorandum of what had been done under the warrant, from which the sheriff made his return.

1816.
MARTIN
v.
BELL
and Another.

The *Attorney-General* for the plaintiff, upon this evidence, proposed to give parol evidence of the warrant, and to prove the arrest by *Withers*, and the subsequent transaction. He contended that he was entitled to do this, since it was the duty of the sheriff to receive back the warrant from the bailiff after its execution, in order to make his return to the court ; this, it appeared, was constantly done where the warrant had not been executed, and it was much more necessary that the executed warrants should be returned, than those which had not been executed. He also contended that the sheriff, by his return of *cepi corpus*, had recognized the act of the bailiff. But

Lord ELLENBOROUGH was of opinion, that the plaintiff was not entitled, under these circumstances, to give parol evidence of the warrant ; and that it was necessary either to produce the warrant, or to shew some recognition, on the part of the sheriff, of the agency of *Withers*.

1816.
 MARTIN
 v.
 BELL
 and Another.

The plaintiff then proved notice to the sheriff to produce the bail bonds, which had been executed and delivered to *Withers*; and he also proved, that one of these had been returned to the sheriff, upon which he had made his return of *cepi corpus*.

Topping and *Holt* for the defendant, objected that this was not sufficient evidence for the purpose of charging the sheriff with the acts of *Withers*; in order to prove the agency of the latter, the warrant itself ought to be produced; and *Withers* himself being dead, application ought to have been made to his representatives, in order to the production of the warrant; and that the evidence which had been offered was mere secondary evidence, and inadmissible for the purpose of proving the agency of the bailiff; and the case of *Drake v. Sykes*, 7 T. R. 113. was cited, where it had been held that the privity between the bailiff and the sheriff must be established by the best evidence, and the language of Mr. J. *Lawrence* in that case was adverted to, particularly where he says "I have always understood it to be necessary to produce the warrant, to shew the relation between them."

Lord ELLENBOROUGH was of opinion, that this evidence was sufficient to prove the agency of *Withers*, unless it could be shewn that some other person was the authorized agent of the sheriff; the bail bond had been returned to the sheriff, and he had returned *cepi corpus*, but he could not take the fruits of the arrest by *Withers*, without adopting his

his act. With respect to the language used by Mr. J. *Lawrence*, the warrant was one medium by which the privity of the sheriff with the act of the bailiff might be established, but it was not the only one.

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MARTIN
v.
BELL
and Another.

Evidence of the arrest and subsequent transactions was then admitted; and it was further proved, that the only fee allowed to the bailiff upon an arrest, was half a guinea in *London*, and one guinea in *Middlesex*, for the caption, and that nothing beyond the amount of the stamp was allowed upon the bail bond.

It appeared that no table of fees had been appointed by the Judges.

The plaintiff had a verdict for a penalty of 50*l.* under the st. 32 G. 2. c. 28., upon the second count, subject to the opinion of the Court, upon a special case.

The *Attorney-General* and *Ross* for the plaintiff.

Topping and *Holt* for the defendant.

See *Martin v. Slade*, 2 N. R. 59. *Bolders v. Masse*, 3 T. R. 417.

1816.

Same day.

JENKINS and Another v. BLIZARD and Another.

A written notice of the dissolution of a partnership reciting the dissolution, and signed by the parties in order to its insertion in the gazette, may be read in evidence to prove notice of the dissolution, although it has not been stamped.

Proof of the insertion of such notice, although but once in a newspaper taken in by the party sought to be affected by the notice, and left at his house in the usual course, is evidence to be left to a jury, without strict proof that the paper ever reached the party.

But the most

usual and prudent course in such cases is to give notice by a circular letter.

THIS was an action by the plaintiffs, who were warehousemen, against the defendants, *Richard Blizzard* and *Alexander Blizzard*, on a bill of exchange, dated *August* the 20th, 1816, drawn by the plaintiffs on the defendants for the sum of 45*l.* 4*s.* 3*d.* payable two months after date, and accepted by *Richard Blizzard*.

The bill had been drawn on account of goods alleged to have been supplied by the plaintiffs to the defendants, as partners; and the defence was, that previous to the supply of these goods, viz. on the 26th of *December*, 1815, the partnership which had previously existed between *Richard Blizzard* and *Alexander Blizzard*, had been regularly dissolved.

On the part of the plaintiffs it appeared, that the pass-book, in which the goods to be supplied by them to the defendants had been entered by the plaintiff's clerk, had been sent as usual when the goods, for which the present bill was drawn, had been supplied; and that no alteration had been made in the title of the book, which purported to belong to *Blizzard* and Co. It also appeared that

the

the words *Blizard* and Co. still remained as before in front of the defendant's shop.

1816.

JENKINS
and Another

v.

BLIZARD
and Another.

In order to affect the plaintiffs with notice of the dissolution of partnership, the defendants first proposed to read the following written notice, signed by the defendants, which had afterwards been inserted in the *Gazette*.

“ December 26, 1815.

“ Take notice, that the partnership between us hath, on and from this day, been dissolved by mutual consent, *Alexander Blizard* having retired therefrom.

“ Witness our hands, { *Richard Blizard,*
 { *Alexander Blizard.*”

Topping for the plaintiffs, objected that this notice contained in effect an agreement to dissolve the partnership, and therefore that it could not be read in evidence without having been first stamped with an agreement stamp. And he referred to the case of *May v. Smith*, 1 *Esp.* 283. where Lord *Kenyon* was said to have held, that the instructions for advertising a dissolution of partnership in the *Gazette* could not be read to prove the dissolution, without an agreement stamp. But

Lord ELLENBOROUGH held, that in this case a stamp was unnecessary, since the instrument did not purport to be an agreement for the dissolution of partnership, but a mere recital that the partnership had already been dissolved.

1816.

JENKINS
and Another

v.

BLIZARD
and Another.

The notice in the *Gazette* was then read.

The defendants proved that a similar advertisement had been inserted once in the *Morning Chronicle* of the 27th of *December*, and also that the plaintiffs took in the latter paper, which the newsman stated to have been delivered in the usual course to some person at the house of the plaintiffs.

Topping objected that this evidence did not entitle the defendants to have this advertisement read; the notice had been advertised in the *Morning Chronicle* once only, and it did not appear that this individual paper had ever reached the plaintiffs.

Lord ELLENBOROUGH was of opinion that it was admissible, and referred to the case where a party was sought to be affected with notice of an advertisement contained in a weekly provincial paper; in that case the paper was not only delivered at the house, but the party was seen to read it. His lordship added, that he should leave it to the jury to say, whether the attention of a tradesman, in reading a newspaper, was not likely to be attracted by notices of the dissolution of partnerships, to which the attention of others might not be directed. His lordship afterwards left it to the jury to say, whether under all the circumstances of the case, the plaintiffs had actually received notice of the dissolution, observing, that in such cases the usual and most prudent

prudent course was to send circular letters to all
with whom the parties had dealings.

Verdict for the plaintiffs.

Topping and Peake for the plaintiffs.

Scarlett and Comyn for the defendants.

1816.

JENKINS
and Another
v.
BLIZARD
and Another.

KING v. FORD.

THIS was an action on a special assumpsit, brought
by the plaintiff against the defendant, (who
kept a school at *Brixworth*,) for having, contrary to
his duty and undertaking, delivered, and caused to
be delivered, to an infant son of the plaintiff's, cer-
tain fire-works, and for having suffered him to
retain the same, by the explosion of which the
plaintiff's son was much wounded and injured, and
whereby the plaintiff was put to great expence
about his cure, &c.

The declaration contained three special counts,
in each of which it was alleged, that the defendant
had delivered, and caused and procured to be deli-
vered, certain fire-works to the plaintiff's infant
son, and had suffered and permitted him to retain
the same in his possession.

use of fire-works by his pupils, that the fire-works from which mischief resulted had, in
fact, been delivered to the pupil by another person, without the authority or knowledge
of the defendant, the variance will be fatal.

Wednesday,
December 4th.

A schoolmaster
who permits
an infant pupil
under his care
to make use of
fire-works, is
responsible in
an action for
the mischief
which ensues.

But if the
declaration
allege that the
defendant (in
such an action)
delivered the
fire-works
to the pupil,
and caused and
procured them
to be delivered
to him, and it
turn out, that
although the
defendant had
permitted the

It

1816.

KING
v.
FORB.

It appeared that on the 4th of *November*, 1814, the defendant had promoted a subscription amongst his scholars, of whom the plaintiff's son was one, for the purchase of fire-works to be used on the evening of the next day, the 5th of *November*. The plaintiff's son was not a subscriber, and on the day following the fire-works were distributed amongst the subscribers. The defendant had invited several persons to his house to see the display, and amongst others a Mr. *Phillips*, who seeing that the plaintiff's son had not been supplied with any fire-works, gave him a dozen of squibs, which he deposited in his breeches pocket. Soon after this, a school-fellow came behind him and wilfully set fire to the whole dozen, the explosion of which lacerated his thigh, and injured him so seriously, that he remained under a surgeon's hands for eleven weeks afterwards.

Lord ELLENBOROUGH, upon this evidence, was of opinion, that since the declaration, in every count, charged the defendant with having actually delivered the fire-works, or caused them to be delivered to the plaintiff's son, it was incumbent upon the plaintiff to prove an actual delivery by the defendant, or at least to shew that the fire-works had been delivered by the defendant's authority. His lordship intimated, that under another form the action would have been maintainable ; and regretted that the difficulty arising from the present form of the declaration, could not be surmounted, particularly since so many calamitous, and even fatal accidents, had

had lately occurred, from allowing such practices at public schools. His lordship thought it proper to state his opinion, that if a master of a school, knowing that fire-works would be used, were to be guilty of negligence in not preventing the use of them, he would be amenable for the consequences. (a)

1816.

KING
v.
FORD.

Plaintiff nonsuited.

Topping, Marryatt, and Spankie for the plaintiff.

The *Attorney-General* and *Gurney* for the defendant.

(a) See the stat. 9 and 10 W. 3. c. 7.

SITTINGS AT WESTMINSTER.

MAYHEW, Gent. v. BOYCE.

Saturday,
December 7th.

THIS was an action on the case, which was brought by the plaintiff, to recover a compensation in damages for an injury occasioned by the negligence of the defendant's agent.

If the driver of a carriage upon a public road may adopt either of two courses, one of which is *safe*

and the other *bazardous*, and he elects the latter, he is responsible for the mischief which ensues. — And he cannot, in such case, insist upon the fact that he kept to his own side of the road.

The

1816.

MAYHEW

v.

BOYCE

The plaintiff was a passenger by a public coach, called the *Phœnix*, from *London* to *Brighton*, and the defendant was one of the owners of another public coach, from *London* to *Brighton*, called the *Dart*.

It appeared that the *Phœnix* being before the *Dart*, in the night-time, the driver of the latter attempted to pass the *Phœnix* at the top of a hill, and just as the latter was about to turn an angle in the road to the left. Many witnesses were called on the part of the plaintiff, to shew, that in consequence of the negligence of the driver of the *Dart* whilst making this attempt, the *Phœnix* was overturned by a violent impulse from the *Dart*, and that the plaintiff, who was an outside passenger, had sustained serious injury, in consequence of his fall.

The case attempted to be established on the part of the defendant was, that at the time when the driver of the *Dart* attempted to pass the *Phœnix*, the road was twenty-seven feet wide, and the *Phœnix* being about three feet from the left-hand side of the road, there was a space of seventeen feet wide to the right of the *Phœnix*, which was amply sufficient to have allowed of the safe passage of the *Dart*, without injury to the *Phœnix*; and that no accident could have happened, if the leading horses of the *Phœnix* had not, whilst the *Dart* was in the act of passing, been driven in an oblique direction from the left to the right side of the road. It was therefore contended, that since the accident happened in consequence of the *Phœnix* having
been

been driven in an oblique direction from the left side, which ought to have been kept, towards the right, the accident was not to be attributed to the conduct of the driver of the *Dart*, and that the action therefore was not maintainable. It appeared, however, that the situation of the *Phœnix* had been seen for some time before the *Dart* came up, and that the driver of the *Dart* might, by driving nearer to the right side than he did, have effectually guarded against the mischief.

1816.

MAYHEW

v.

BOYCE.

Lord ELLENBOROUGH. — This is decisive of the case ; if it be practicable to pursue a course which is safe, and you follow so closely upon the track of another that mischief may ensue, you are bound to adopt the safe course. This is the principle which is always acted upon in cases of injuries done to ships at sea. In point of law, it would make no difference whether the horses of the *Phœnix* swerved from their course at the instant when the *Dart* was passing, or they were directed by their driver ; he had a right so to direct them, unless he knew that the *Dart* was following so closely behind. The circumstance of the *Phœnix* being on the wrong side of the road, on which the *Dart* had a right to pass, would not authorise the exercise of that right to the extent of destruction. The *Phœnix* at that time had the whole free range of the road, and the driver had a right to occupy any part of it, unless he was aware of the proximity of the *Dart*. In the night-time there is always risk, and when one coach follows close upon the track of another, and there
are

1816.

MAYHEW

v.

BOYCE.

are two ways, one of which is perilous and the other safe, the driver is bound to adopt that which is safe. The *Phoenix* being three feet from the left side, the driver thought it safer to take more room, and he had a right to do so, and the driver of the *Dart* ought to have calculated upon his exercise of that right.

Verdict for the plaintiff. Damages 200*l*.

The *Attorney-General*, Gurney, and Comyn, for the plaintiff.

Topping, *Scarlett*, and *Espinasse* for the defendant.

Same day.

JAMES and CHAPMAN v. SHORE.

Where different lots are sold at an auction for different sums, the contracts are separate, both in law and fact. — And in a special action for refusing to adhere to the conditions of sale, the plaintiff cannot consolidate the two contracts.

THIS was an action of special assumpsit.

The plaintiffs were commissioners appointed under an inclosure act, which authorised them to sell by public auction part of the inclosed lands, in order to defray the expences of the inclosure. Several lots of land were accordingly put up to public sale by auction. By the printed conditions of sale, a deposit was to be made by the purchaser, and the whole of the purchase money was to be paid

paid within a limited time afterwards ; and they also contained a stipulation, that in case the purchaser made default, the commissioners should be at liberty to re-sell, and to charge the original purchaser with the difference between the original price and that of the re-sale.

1816.
JAMES and
CHAPMAN
v.
SHORE.

The defendant at the sale was the highest bidder for lot 9, at 530*l.*, and for lot 10, at 550*l.*; and his name had been entered by the auctioneer as the purchaser of these two lots upon the printed particulars of sale.

By the inclosure act above alluded to it was directed, that the property to be sold by the commissioners should vest in the purchaser, by virtue of a receipt to be signed by the commissioners on payment of the purchase money : such a receipt had been tendered in due time to the defendant by the commissioners ; but he had refused to pay the amount, alleging that he had acted as trustee only for a person of the name of *Morgan*. The commissioners had in consequence proceeded to a re-sale, and claimed the sum of 591*l.* as the loss on the re-sale, together with the auction duty.

The articles of sale had been stamped, on payment of a penalty of 10*l.*, with an agreement stamp.

The special counts of the declaration alleged, (*inter alia*) that divers lots had been put up to public

1816.
 JAMES and
 CHAPMAN
 v.
 SHORE.

public sale, and that the defendant had then and there become the purchaser of divers, to wit, two lots, numbers 9 and 10, for divers sums of money, amounting to a large sum of money, to wit, the sum of 1080*l*.

They then proceeded to allege, mutual promises to fulfil the special conditions of sale, and stated, by way of breach, the defendant's default in neglecting and refusing to pay the deposit or purchase money.

The declaration also contained a general count in *indebitatus assumpsit*, for estates bargained and sold.

The *Attorney-General* and *Richardson* for the defendant objected, 1st, that the contract was not binding on the defendant, without a written instrument; and that the auctioneer could not, in this case, be considered to be the joint agent of both parties, but as the agent of the plaintiffs only, and, consequently, that he could not bind the defendant by signing his name to the articles of sale.

2dly, That, supposing the case to be sufficiently taken out of the statute of frauds; yet that the contract was not sufficiently stamped, since not fewer than twelve lots were specified on the conditions of sale, the agreements in respect of the purchase of which were separate, and required separate stamps; and that it appeared, in fact,

that the stamp which appeared on the conditions had been applied to a different contract, since the stamp had been placed on a clause in the conditions by which it was stipulated, that *F. Sherburn* was to bid for the plaintiffs, and that if any lots should be knocked down to him, he was to be considered as a purchaser for the plaintiffs.

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JAMES and
CHAPMAN
v.
SHORE.

3dly, That the declaration was defective, since it stated a contract for the purchase of two lots, and supposed that they were both purchased under the same contract, whereas in fact, there was no joint contract for two lots, but two separate contracts, one for each lot, which was complete at the close of each bidding.

For the plaintiffs it was contended, that they were at liberty to apply the stamp to which contract they chose, and that the placing of the stamp was merely accidental, it being optional in the officer at the stamp office to impress it upon whatever part of the paper he chose; and they cited the case of *Powell v. Edmunds*, 12 *East*, 6. With respect to the variance, it was urged that the joint promise resulted from operation of law, and that it would be productive of great inconvenience if a plaintiff were not to be permitted to allege a purchase in the aggregate in such cases, and that at all events the plaintiffs were entitled to recover on the general count. — But

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LORD ELLENBOROUGH held the variance to be fatal, since the declaration stated the purchases as one contract, and in point of both law and fact the agreements were separate. — With respect to the inconvenience which had been suggested, his Lordship said, that he was quite of a different opinion; and that much greater inconvenience would result from permitting the consolidation of contracts. With respect to the general count, the commissioners were authorized by the act to re-sell, and having re-sold these lots they could not be considered as sold to the defendant.

Plaintiff nonsuited.

Raine, Bolland, Chitty, and Stirling for the plaintiffs.

The *Attorney-General* and *Richardson* for the defendant.

DOE on the Demise of DELEGAL and Others 1816.
v. HOLLOWAY.

Same day.

THIS was an action of ejectment brought to recover possession of a freehold estate at *Forty Hill*, in the county of *Middlesex*, in consequence of the nonpayment of the arrears of an annuity charged on the estate, and due to *Delegal*, one of the lessors of the plaintiff, from *Sarah Branscomb*, the grantor, who was tenant for life of the premises under the will of Sir *J. Branscomb*, her late husband.

The defendant claimed under an assignment by the assignees under a commission of bankrupt against *Sarah Branscomb*.

It appeared that the estate had been settled to the use of such person or persons as Sir *J. Branscomb*, by any writing, &c, signed, sealed and delivered by him, in the presence of two or more witnesses, should direct, limit and appoint. — Sir *J. Branscomb* had by his will, attested by three witnesses, devised and bequeathed the estate in question to his wife for life. One of the attesting witnesses stated, that the will was read over to Sir *J. Branscomb*, who signed it, and placing his hand on the wax for the purpose of acknowledging his seal, delivered it out of his hands to some person present.

An estate is settled to the use of such person, &c. as J. B. shall by any writing, &c., signed, sealed and delivered by him, in the presence of two or more witnesses, direct, limit, and appoint. J. B. may execute this power by his will, signed, sealed and delivered in the presence of three witnesses.

A trustee under an annuity deed executes the deed after the memorial has been enrolled, it is not necessary that a memorial of his subsequent execution should be enrolled.

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 Doe
 and Others
 v.
 HOLLOWAY.

The *Attorney-General* for the lessors of the plaintiff contended, that this was a sufficient execution of the power, since every requisite comprized in the power had been complied with, and that it was immaterial whether the execution was by a deed attested by two witnesses, or by a will sealed and delivered.

Marryatt for the defendant contended, that a will was not an instrument within the terms of the power, it was an instrument of a different nature, requiring the attestation of three witnesses, whereas two only were requisite under the power. He also contended that it was necessary to prove a delivery as of a deed.

Lord ELLENBOROUGH was of opinion, that the will was an instrument within the meaning of the terms of the power, and that since the will had been sealed and delivered in the presence of more than two witnesses, it operated as an appointment. He was also of opinion, that a delivery as a deed was not essential, and that the delivery which had been proved was sufficient. (a)

In the course of the cause it appeared, that one *Batt*, who was one of the lessors of the plaintiff, was a trustee under the annuity deed, but that his execution of the deed was not noticed in the

(a) See the Cases of *Wright v. Wakeford*, 4 Taunt. 213. *Doe on Dem. Mansfield v. Peach*, 2 M. & S. 576. *Habergbam v. Vincent*, 5 T. R. 92.

memorial;

memorial; it also appeared by an indorsement on the deed, that he had in fact executed the deed, but the time of execution did not appear.

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and Others
v.
HOLLOWAY.

Marryatt objected, that on account of this omission in the memorial the deed was void, the stat. 17 G. 3. c. 26. s. 1. requiring that the memorial shall contain "the day of the month and the year when the deed, &c. bears date, and the names of all the parties, and for whom any of them are trustees, and of all the witnesses, &c. — otherwise every such deed, &c. shall be void."

The *Attorney-General* answered, that it frequently happened that a trustee did not execute the deed for some time afterwards, and that in order to give any weight to the objection it was incumbent on the defendant to shew, that the deed had been executed by the trustee previous to the time of enrollment.

Lord ELLENBOROUGH said, that since it did not appear at what time *Batt* had executed the deed, he should not nonsuit the plaintiff; and he afterwards had a verdict with leave for the defendant to move the point.

The *Attorney-General*, *S. Comyn*, and *R. B. Comyn* for the plaintiff.

Marryatt for the defendant.

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and Others
v.
HOLLOWAY.

In the ensuing term *Marryatt* moved for a rule *nisi* to enter a nonsuit, contending, that even assuming the deed to have been executed by *Batt* subsequent to the enrollment, it was essential that a memorial should have been added within the time limited by the statute; but the Court observed, that if the doctrine contended for were true, it would be in the power of every trustee, in whose custody the deed was left, to vacate it by a subsequent execution of it, without procuring such execution to be enrolled, and the Court, in the absence of any authority, to shew that successive enrollments were necessary, refused the rule.

Same day.

HILL v. GRAY.

The agent of the vendor of a picture knowing that the vendor labours under a delusion, with respect to the picture, which materially influences his judgment, permits him to make the purchase without removing that delusion. — The sale is void.

THIS was an action of assumpsit to recover the sum of 1000*l.* for a *Claude* which had been sold by the plaintiff to the defendant.

It appeared that a person of the name of *Butt* had been employed by the plaintiff to sell the picture in question: the defendant being desirous of purchasing it, pressed *Butt* to inform him whose property it was, which the latter refused to do. In the course of the treaty, *Butt* being at that time

employed

employed in selling a number of pictures for Sir *Felix Agar*, the defendant, misled by circumstances, erroneously supposed that the picture in question was also the property of Sir *Felix Agar*. *Butt* knew that the defendant laboured under this delusion, but did not remove it, and the defendant, under this misapprehension, purchased the picture. The plaintiff offered to prove, by the testimony of the most eminent artists, that the picture was a genuine *Claude*, and of great value; and it appeared, that after the sale had been completed, and after the defendant had been informed that the picture was not the property of Sir *Felix Agar*, he had objected to the payment, not on the ground of any deception that had been practised with respect to the ownership, but on the ground that the picture was not a genuine *Claude*.

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v.

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LORD ELLENBOROUGH. — Although it was the finest picture that *Claude* ever painted, it must not be sold under a deception. The agent ought to have cautiously adhered to his original stipulation, that he should not communicate the name of the proprietor, and not to have let in a suspicion on the part of the purchaser, which he knew enhanced the price. He saw that the defendant had fallen into a delusion in supposing the picture to be Sir *Felix Agar*'s, and yet he did not remove it. I take for granted that you will be able to prove, by the judgment of the first professional artists, that this is a genuine picture of *Claude*'s, and it would not be possible to go further. In Italy the fact

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might admit of other proof, as where a picture has been long preserved in a particular cabinet : here it can only be proved by the concurrent judgment of artists as to its similitude. — This case has arrived at its termination; since it appears that the purchaser laboured under a deception, in which the agent permitted him to remain on a point which he thought material to influence his judgment. I am of opinion that the contract is void.

Plaintiff nonsuited.

The *Attorney-General* and *Comyn* for the plaintiff.

Scarlett for the defendant.

Fraud will vitiate a contract although the principal take no part in it, for he is civilly responsible for the acts of his agent; see *Doe* on the Demise of *Wilks v. Martin*, 4 T. R. 39.

BAKER v. TOWRY.

Same day.

A vessel strikes upon a rock and remains fixed there for the space of fifteen or twenty minutes, in consequence of which she sustains a material injury. This constitutes a stranding.

THIS was an action on a policy of insurance on goods at and from Limerick to Cadiz. The only question was, whether the vessel had been stranded.

The vessel, with the insured goods on board, set sail on the 21st of *June*, 1814: on the 25th she encountered the *Forge* and rock *Basket*, which are a cluster of rocks extending about six miles in length;

length; the great *Basket* being about a cable's length from the main land, and the *Forge* rock being from thirty to forty feet in height above the level of the sea. A strong current setting in towards the land, the vessel could not avoid the rock, in attempting it she struck upon it, and remained there from a quarter of an hour to twenty minutes. In consequence of this accident the vessel received considerable injury, and leaked much during her voyage to Cadiz.

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BAKER
v.
TOWRY.

Lord ELLENBOROUGH informed the jury, that if they were of opinion upon the evidence that the ship had been fixed, as stated by the witness, for the space of from fifteen to twenty minutes, it was sufficient to constitute a stranding.

See *Dobson v. Bolton*, 1 Park, 177, 7th Ed. *Macdougall v. The Royal Exchange Assurance Company*, 4 Campb. 283. and *supra*. 130.

FORSYTH and Others v. JERVIS.

Same day.

THIS was an action to recover the value of a gun, sold by the plaintiffs to the defendant.

A brings an action against B for the price of a gun ordered

by the latter, he may read in evidence, for a collateral purpose, part of a letter written by B to him; although the remainder of the letter contains directions for making the gun, and is not stamped as an agreement.

B agrees to purchase of A a gun for the sum of forty-five guineas; but it is stipulated, that A shall take a gun of B's, valued at thirty guineas, in part payment, B having refused to deliver his gun and complete the contract, A is entitled to recover the sum of forty-five guineas as the stipulated price.

The

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FORSYTH
and Othersv.
JERVIS.

The plaintiffs were gun-makers, and the defendant wishing to have a gun made by them, it was agreed that they should make one for the sum of forty-five guineas, but that they should take a gun of the defendant's, made by *Manton*, in part payment, at the estimated price of thirty guineas. The *Manton* gun had accordingly been delivered to the plaintiffs, but had been afterwards borrowed by the defendant; and the former, in order to shew that the *Manton* gun had been merely lent by them to the defendant, proposed to read a letter written to them by the defendant, requesting them to lend him the *Manton* gun for a few days for the purpose of snipe shooting. The letter also contained instructions as to the making of the new gun.

The *Attorney-General* and *Richardson* for the defendant objected, that since the letter had been written before the completion of the new gun, and since the new gun had been in fact made according to the directions contained in the letter, it could not be read in evidence without an agreement stamp.

LORD ELLENBOROUGH. — It cannot be read as evidence of the contract, but the plaintiffs may read that part of it which is necessary in order to shew the reason of taking away the *Manton* gun. It is certainly evidence for that purpose, although it may not be so for any other, and if they had had no other evidence to prove the contract they could not have used it.

It

It was afterwards objected, that since the contract in fact was to pay fifteen guineas, and to deliver the *Manton* gun for the new one, the plaintiffs were not entitled to recover more than the sum of fifteen guineas in this action for goods bargained and sold.

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 FORSYTH
 and Others
 v.
 JERVIS.

But Lord ELLENBOROUGH was of opinion, that since the contract was for the sale of goods to be in part paid for by the delivery of goods of a stipulated value, upon the refusal of the purchaser to pay for them in that mode a contract resulted to pay for them in money.

Scarlett and *Tindall* for the plaintiffs.

The *Attorney-General* and *Richardson* for the defendant.

DELAUNEY v. MITCHELL.

Monday,
 Dec. 9th.

THIS was an action by the plaintiff as the indorsee of a bill of exchange against the defendant as the acceptor.

Notice having been given in an action on a bill of exchange that the want

of consideration will be set up as a defence, it is not competent to the plaintiff, after he has closed his case, to go into evidence of consideration in reply to the defendant's case.

A being a creditor of B's, and having deeds in his possession as a security for the debt, receives a bill indorsed by B for the purpose of getting it discounted, he cannot disappropriate the bill, and maintain an action upon it against the acceptor.

Scarlett

1816.

DELAUNAY
v.
MITCHELL

Scarlett for the plaintiff having adduced the usual documentary proofs, was inclined to rest his case there, intimating that if in the course of the cause it should become necessary, he was prepared to prove the consideration given for the bill.

The *Attorney-General* insisted, that since *notice had been given* that one ground of defence was the want of consideration, it would not be competent to the plaintiff, after having closed his case to go subsequently into such evidence.

Lord ELLENBOROUGH held, that *after such notice* he could not.

It appeared that the bill had been drawn by *Elizabeth Clewer* on the defendant for the sum of 400*l.* payable to her own order, and had been indorsed by *E. Clewer* to *Henry Clewer*, and by the latter to the plaintiff. *Elizabeth Clewer*, in order to prevent the striking a docket against *Henry Clewer*, her son had delivered the bill to the plaintiff, in order to get it discounted. The plaintiff having already in his possession certain deeds as a security for a debt due from *H. Clewer*, having got the bill into his possession, insisted upon retaining both the bill and deeds as securities for the debt.

Lord ELLENBOROUGH held, that it was not competent to the plaintiff, after having received the bill for the special purpose of procuring it to be discounted

discounted for the benefit of *E. Clewer*, to disappropriate it.

1816.

DELAUNEY
v.
MITCHELL

Plaintiff nonsuited.

Scarlett and Comyn for the plaintiff.

The *Attorney-General* for the defendant.

REX v. GASH, and Another.

Tuesday,
Dec. 10th.

THIS was an indictment against the two defendants, as members and stewards of a friendly society, for not obeying an order made by two magistrates of the county of *Middlesex*, directing the defendants, and other members of the society, to restore *Job Jamieson* to his situation, as a member of the society.

A friendly society whose rules have been allowed by the magistrates, and registered in *London*, afterwards hold their meetings in *Middlesex*, the justices of *Middlesex* have jurisdiction to decide upon complaints made by members of the society.

The indictment contained the order (which was dated the 3d of *October* 1815) which was set out at length, and recited, that complaint had been made to the magistrates, residing near the place where the society was held, by *Job Jamieson*, according to the statute 33G.3.c.54. that he had been excluded from

Upon a complaint made by an excluded

member, A and B, the then stewards, are duly summoned, and an order is made by two justices that such stewards and other members of the society shall forthwith reinstate the complainant. The order is served upon A and B after they have ceased to be stewards; but it is still obligatory upon them, as members of the society, to attempt to reinstate the complainant, and their having ceased to be stewards is no justification of entire neglect on their part.

the

1816.
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 REX
 v.
 GASH
 and Another.

the society, against the rules of the society, and contrary to the statute. — That the society had been duly enrolled. — That the defendants, being the stewards, had been duly summoned, and had thereupon appeared before the magistrates, who proceeded to hear the matter of the said complaint, and having heard the allegations of *Job Jamieson*, upon oath, and the allegations of the said defendants, did adjudge, that the said defendants, and the other members of the said society, should forthwith restore, re-instate, and re-admit the said *Job Jamieson* as a member of the said society. The indictment then alleged the service of notice of the order upon the defendants, and their neglect and refusal. A copy of the order had been served on the defendants, on the 22d of *June* 1816.

It appeared, that the society had originally been established in *London*, and that the rules of the society had been enrolled at the sessions for *London*, as required by the act. Afterwards the meetings had always been held at the *Pewter Platter*, in *Middlesex*, near the *Hatton Garden* office, at which the complaint had been made, and where two magistrates of the county of *Middlesex* had made the order. There had been no subsequent enrollment at the sessions for *Middlesex*.

Gaselee for the defendants, objected, that under these circumstances, two magistrates of the county of *Middlesex* had no authority to make the order, since the 15th section of the statute 33 G. 3. c. 54.

under which the order assumed to have been made, enacted, "that if any member of such society shall think himself aggrieved by any act done or omitted to be done by such society, or any person acting under them, it shall be lawful for two justices, near unto the place *where such society shall be established*, upon complaint made upon oath or affirmation, to issue their summons," &c. In this case (he urged) the society was to be considered as *established* in *London*, where its rules had been submitted to the magistrates, allowed, and filed.

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 REX
 v.
 GARR
 and Another.

Gurney and *Lawes* for the prosecution, contended, that for the purposes of complaint, the society was to be considered as established where its meetings were held; a contrary construction would defeat the operation of the act, since the magistrates of *London* could not enforce any process in *Middlesex*. And they referred to the later statute, 49 G. 3. c. 125. s. 1. which enacts, "That if any person having been admitted a member of any society established under the authority of the said act (*i. e.* the 33 G. 3.) shall offend against any of the rules, &c. of the said society, it shall be lawful for any two justices of the peace, residing within the county, &c. within which such society shall be held, upon complaint made on oath, by any member of such society, to issue their summons," &c.

Lord

1816.
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 REX
 v.
 GASH
 and Another.

LORD ELLENBOROUGH was of opinion that the variation of the terms giving jurisdiction in the latter statute, was certainly very favourable to the construction contended for on the part of the prosecution; — his Lordship, however, upon this point, afterwards gave leave to the defendant to move to have a verdict of acquittal entered.

Upon the production of the regulations of the society, it appeared that the stewards were to be changed every six months, and that meetings were to be held every six weeks, it was therefore objected, that since the order was made in *October* 1815, the copy served in *June* 1816 ought to have been served not upon the present defendants, but upon the then stewards, who alone were responsible for not having obeyed the order, by causing the complainant to be re-instated.

LORD ELLENBOROUGH. — The order is not confined to the stewards alone, but is made upon all the members of the society, and the defendants were members of the society independently of their being stewards, and were bound as members to see that the order was obeyed, or at least to have taken some steps for that purpose. As members they might have done something, as stewards, indeed they might with greater facility have enforced obedience to the order, but each member had it in his power to lend some aid for the attainment of that object.

The

The jury found both the defendants guilty — subject to the motion as to the jurisdiction of the magistrates who made the order.

1816.
 Rex
 v.
 GASH
 and Another.

Gurney and *V. Lawes* for the prosecution.

Gaselee and *Walford* for the defendants.

In the ensuing term *Gaselee* moved to enter a verdict for the defendants, on the ground of the defect in the jurisdiction of the magistrates, as objected at the trial. He also moved on the ground that the defendants having ceased to be stewards when the notice was served, had not been guilty of a criminal default.

But the Court were of opinion, that the word *established* did not *exclusively* mean the place where the society was originally established by holding its meetings there, and that it might properly be said to be established where its meetings were held, since they were an ambulatory body, and might change their residence; and that the mere change of residence did not operate to the destruction of the existing rules approved of and registered. The Court also over-ruled the second objection, observing that if the defendants had shewn that they went to the meeting, and did every thing in their power to restore the party in obedience to the order, they might have given it in evidence by way of excuse.

IN THE KING'S BENCH.

ADJOURNED SITTINGS AT GUILDHALL.

1816.

Wednesday,
Dec. 11th.

Two plaintiffs
who sue as the
indorsees of a
bill of ex-
change, in-
dorsed in
blank, are not
bound to prove
any partner-
ship.

RORDASNZ and Another v. LEACH.

THE two plaintiffs sued as the indorsees of two bills of exchange.

The bills had been indorsed in blank, and the only question was, whether it was incumbent on the plaintiffs to prove their joint title to sue on the bill, by shewing that they were partners, or by proving a transfer to them jointly.

Lord ELLENBOROUGH held that it was not.

Verdict for the plaintiffs.

See the case of *Mackell* and *Others v. Kinnear*, *infra*. In that case, although the indorsement was in blank, it appeared that a right of action was vested in other persons than the plaintiffs, and no

presumption arose from the fact of the possession of the bill by the plaintiffs, since two out of three plaintiffs were the legal owners. See *Ord* and *Others v. Portal*, 3 Campb. 239.

GREEN and Another, v. HAYTHORNE and Others.

1816.

THIS was an action of trover, brought to recover the value of twelve bags of wool.

The defendants, who were *Spanish* merchants at *Bristol*, on the 8th of *August* 1815, sold to *Jarman* and *Lacy* 68 bags of wool, which, by the invoice, were to be weighed off immediately, and were to be paid for by a bill of exchange, payable nine months after date; but no such bill was ever drawn by the defendants. The wools, which were of different qualities and values, and had been weighed, remained in the warehouse of the defendants, but samples were sent to *Jarman* and *Lacy*, the vendees, to enable them to go into the market, and upon sales by them from time to time, to different purchasers, of parts of this wool, orders were given to such purchasers, to enable them to receive the wool from the defendants, who delivered such parcels accordingly. On the 12th of *October*, the plaintiffs purchased from *Jarman* and *Lacy* twelve bags of this wool of a *specified* description, and *Jarman* and *Lacy* received the amount in *Cassimeres*. On the 16th of *October*, the plaintiffs in *London*, having

Same day.

A at *Bristol* sells goods to B to be paid for by B's acceptance of a bill to be drawn by A: the goods are weighed, but remain in A's warehouse, who omits to draw the bill. B sells a specific and ascertained portion of these goods to C in *London*, who pays for them and transmits B's order to A for the delivery of them. On the fourth day after A's receipt of the order B becomes bankrupt, and then, and not before, A refuses to deliver the goods to C, insisting that he has a lien

upon them for the price. — C may maintain trover against A; for he was bound at all events to notify his refusal immediately. — And (*semble*) having neglected to draw the bill, and having furnished B with samples to go into the market with, and having obeyed several orders of B's for the delivery of portions of the goods to different sub-vendees, he could have insisted upon any lien, even if he had given immediate notice.

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1816.
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 GREEN
 and Another
 v.
 HAYTHORNE
 and Others.

obtained an order from *Jarman* and *Lacy* for the delivery of the goods, transmitted it to them at *Bristol*, and required them to deliver the goods accordingly ; but the order was not obeyed. On the 21st of *October* *Jarman* and *Lacy* became bankrupts. It also appeared, that at the time of the sale to the plaintiffs, twenty-two only of the bags were left in the defendants' warehouse, and that ten of these had been specifically appropriated.

Jervis for the defendants submitted, that this was nothing more than the ordinary case of a vendor and purchaser, the vendor remaining in possession, and that consequently, until the price had been paid, the defendants had a lien on the goods remaining in their hands, for the whole amount, and that although the plaintiffs might have paid the amount of the goods purchased by them to *Jarman* and Co., yet that with respect to the defendants, they did not stand in a better situation than *Jarman* and Co. would have done, who could not have insisted upon a delivery of the remaining bags, without payment. He also contended, that the sale had not been completed, so as to vest the property in the vendees ; and he cited *Hanson v. Meyers*, 6 *East*, 614., where the Court held, that a sale of starch was not complete, because the whole of it had not been weighed, although there had been a partial delivery. As between the defendants and *Jarman* and *Lacy*, the wool had been weighed; but as between the present parties, there had been no specific appropriation. In *Stoveld v. Hughes*, 14 *East*, 308., great part of the
 goods

goods had been delivered, and the plaintiff was held to be entitled to recover the rest, because he had put marks upon them, and had measured them, and the vendors had assented to the sub-sale. But here there was no assent on the part of the vendors, on the contrary, he was in a situation to prove an express dissent.

1816.
GREEN
and Another
v.
HAYTHORNE
and Others.

Lord ELLENBOROUGH.— I am of opinion that this was an executed contract. Here was a sale of 68 bags, which were delivered out by the vendors from time to time, according to the order of the vendees, who were furnished with an invoice, and with samples, to enable them to go into the market. With respect to the payment, the defendants were to take the first step, by drawing a bill, which they have omitted to do, but there was no resistance to the payment, and as far as appears, the vendees acceptance would have been given, and it was owing to the default of the vendor, that it was not given. Then as to the appropriation, the moment the 10 are deducted from the 22, the 12 remain, for which trover may be maintained, since there is no uncertainty on the subject. There is no doubt, therefore, either as to the quantum or as to quality, and after the time of the sale, the defendants' warehouse was the warehouse of the purchaser. I think, therefore, that the plaintiffs are entitled to recover.

Verdict for the plaintiffs.

1816.

Marryatt and Parke for the plaintiffs.

GREEN
and Another
v.

Jervis and Alderson for the defendants.

HAYTHORNE
and Others.

In the ensuing term *Jervis* moved for a rule to shew cause why there should not be a new trial, contending that the defendants had a lien on the wool undelivered, which had never been removed from the warehouse; and that although the omission of the defendants to draw a bill upon *Jarman* and *Lacy*, might be considered as a waiver with respect to the wool actually delivered, yet that it could not be so considered as to the portion which had not been delivered; and that although the objection as to weighing, which in the case of *Hanson v. Meyers* was considered to be a condition precedent, did not apply to this case, yet still the acceptance of the bill was to be considered as a condition precedent. And that the delivery of part could not be taken to be equivalent to a delivery of the whole in this case, as it was in the case of *Slubey and Smith v. Heyward and Fox*, 2 H. Bl. 504., since in this case the remaining goods had never been removed from the warehouse of the defendants.

The Court seemed to be inclined at first to give an opportunity for a further consideration of the question; but upon adverting to the circumstance that the letter containing the order for the

delivery of the goods had been transmitted by the plaintiffs in *London* on the 16th to the defendants at *Bristol*, and that the defendants had not signified their dissent until after the insolvency of *Jarman* and *Lacy*, which took place on the 21st, the Court were of opinion, that the defendants ought to have intimated their intention immediately upon their receipt of the plaintiffs' letter, and ought not to have delayed it until after the insolvency.

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GREEN
and Another
v.
HAYTHORNE
and Others.

Jervis submitted that the defendants had notified their intention as soon as they could reasonably have been required to do so.

But the Court were clearly of opinion that the notice came too late; if it had been a question as to reasonable time, the delay of four days between the receipt of the plaintiffs' letter on the 17th, and the insolvency of *Jarman* and *Lacy*, might not have been considered as unreasonable; but the defendants knew that they had not been paid by *Jarman* and *Lacy*, and ought to have signified their intention immediately, and if they had doubted on the subject, they ought to have written to the plaintiffs to inform them that they had not come to a decision, and they might have acted accordingly. The plaintiffs wrote on the 16th, upon the supposition that they had the entire power of disposing of the goods: from the 17th, when the letter would have reached the defendants, four whole days elapsed, during which they re-

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 GREEN
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 v.
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 and Others.

posed in confidence on the credit of the original purchasers, and then the circumstance of the insolvency of those purchasers occurred, which made it convenient to the defendants to insist upon their suspended rights, which it was not competent for them to do. In the absence of notice they must be taken to have assented to the order.

Rule refused.

See *Goodall v. Skelton*, 2 H. B. 316. *Whitehouse v. Frost*, 12 East, 614. *Austin v. Curwen*, 4 Taunt. 644. *Wallace v. Breeds*, 13 East, 522. *Rugg v. Minett*, 13 East, 210. *Busk v. Davis*, 2 Maule & Sel. 397. *Shepley v. Davis*, 1 Marsh. 252. *Hunt v. Stevens*, 3 Taunt. 113.

Same day.

KENNERLY v. NASH.

A draws a bill of exchange upon B, payable at three months, for a debt due from B to A. On the delivery of the bill to B for acceptance, B requests that *four months* may be substituted for *three*, and afterwards, by the assent of A, the alteration is made, a new stamp is not requisite.

A bill is drawn for the sum of 100*l.* payable four months after date, bearing interest. The interest is to be calculated from the date of the bill.

THIS was an action by the plaintiff, as the indorsee of a bill of exchange, dated the 25th of *February* 1816, drawn by one *Maules*, upon the defendant, for the sum of 25*l.* 4*s.* payable four months after date, *bearing interest*.

This bill had been drawn by *Maules* a tailor, for the amount of a bill due to him from the de-

fendant.

fendant. A witness stated, that the bill as it was first drawn, was payable three months after date, and that he took it in that state to the defendant for acceptance, a few days after it had been drawn; and that when the bill was delivered to the defendant for acceptance, he desired the witness to go to *Maules*, to get the time altered from four to three months, saying, at the same time, that the alteration would not vitiate the bill, and that it would not be worth while to be at the expence of a new stamp. *Maules*, it appeared, upon application to him for that purpose, assented to the alteration, and the witness altered the bill accordingly, at *Maules's* request.

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Lord ELLENBOROUGH held, that under these circumstances, a new stamp was unnecessary (a); and he also held, that under the words *bearing interest*, the plaintiff was entitled to recover interest from the date of the bill, since without any such words, he would be entitled to interest from the time when the bill became due.

The jury found their verdict accordingly.

Comyn and *Chitty* for the plaintiff.

Topping for the defendant.

(a) See *Bowman v. Nicboll*, 5 T. R. 537. *Master v. Miller*, 4 T. R. 320. 2 H. Bl. 141. *Kershaw v. Cox*, 3 Esp. 246. *Knill v. Williams*, 10 East, 431. *Cardwell v. Martin*, 9 East, 190. *Trapp v. Spearman*, 3 Esp. 57. *Marson v. Petit*, 1 Campb. 82. n.

1816.

SHEPHERD v. CURRIE.

Same day.

The question being whether a piece of cloth has been returned by the defendant to the plaintiff, the production of a note by the defendant, in which the plaintiff requests him to return the piece by the bearer, is *prima facie* evidence to shew that the piece has been returned.

And the plaintiff ought to call the bearer of the note to shew that the piece has not been returned through him.

THIS was an action of assumpsit for goods sold and delivered, and the principal question was, whether one of two pieces of cloth which had been sent to the defendant, had been returned by him to the plaintiff.

The defendant gave in evidence the following note, written by one *Wilson*, a person in the employment of the plaintiff.

"Please to deliver to the bearer No. 3,500 of superfine scarlet cloth which you do not keep."

Lord ELLENBOROUGH held, that after this evidence, it was incumbent upon the plaintiff to call the bearer of the note, in order to shew, that the piece of cloth in question, had not in fact been taken back by him, and that otherwise, since the note was in the possession of the defendant, and imported that a piece was to be returned by the bearer, it was to be presumed that the piece had been delivered to some bearer, through whose agency it had been returned to the plaintiff.

Marryatt for the plaintiff.

The *Attorney-General* for the defendant.

HARLAND v. BROMLEY.

1816.

THIS was an action of assumpsit, to recover for the use and occupation of a dwelling-house for one half year, from *Christmas* 1815 to *Midsummer* 1816.

The plaintiff proved an occupation by the defendant, as his tenant, during the preceding half year only, *i. e.* from the *Midsummer* to the *Christmas* of 1815.

Holt for the defendant objected, that this was insufficient, without proving some occupation during the subsequent half year, in respect of which the claim was made.

But Lord ELLENBOROUGH was of opinion, that the occupation was to be considered as continuing, unless the defendant could shew some determination of it.

The defendant then proved that on or before *Christmas* 1815, the keys of the house had been delivered by an agent of the defendant's, to a female servant at the house of the plaintiff, and also a declaration on the part of the plaintiff, that the keys had been lost or mislaid. —

But Lord ELLENBOROUGH deemed this to be insufficient evidence to prove a determination of the tenancy,

Same day.

In an action for the use and occupation of a house for six months, it is *prima facie* sufficient for the plaintiff to shew an occupation of the house by the defendant, as his tenant, for the preceding six months, since the continuance of the tenancy is to be presumed until the contrary appear.

And it is not sufficient in such case for the defendant to prove that the keys had been previously delivered to a servant at the plaintiff's house, and a subsequent declaration on the part of the plaintiff that the keys had been lost or mislaid.

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 v.
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tenancy, inasmuch as it did not appear that the keys had ever reached the plaintiff, and been accepted by him, and that the maid servant to whom they had been delivered, ought to have been called.
 Verdict for the plaintiff.

Marryatt and Comyn for the plaintiff.

Holt for the defendant.

Same day.

LAWSON and Others, Assignees of SHIFFNER, a Bankrupt, v. ROBINSON.

Where no notice has been given to dispute the bankruptcy in an action by the assignees, it ought to appear from the deposition that the petitioning creditor's debt was due at the time of the act of bankruptcy.

THIS was an action of assumpsit, by the assignees of *Shiffner*, a bankrupt, to recover the sum of 376*l.* 18*s.* for premiums on policies of insurance, effected by *Shiffner*, (being an insurance broker,) on account of the defendant.

No notice having been given to dispute the bankruptcy, the depositions before the commissioners were read in evidence.

Parke for the defendant objected, after the depositions had been read, that there was not sufficient evidence on the face of them to prove the petitioning creditor's debt, since the deposition merely stated that the bankrupt was indebted to the petitioning creditor at the time of the deposition, and not at the time of the act of bankruptcy, as it ought to

to have done. And he referred to the case of *Clarke v. Askew*, tried before Mr. Justice *Bayley*, at the last assizes for the county of *Durham*, where a similar objection had been taken, and the point was still under the consideration of the Court.

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v.
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LORD ELLENBOROUGH, upon its being suggested that the deposition was in the usual form, was unwilling to nonsuit the plaintiff, but gave leave to the defendant to move it. (*a*)

But upon afterwards referring to the proceedings, the deposition was to this effect, *viz.* that the said — *Shiffner* is justly and truly indebted to this deponent, &c. in the sum of, &c. upon the balance of an account for money lent and advanced, and money paid, laid out, and expended to and for the use of the said *G. Shiffner*, between the month of *February* and the month of *April* 1813. It also appeared, that the act of bankruptcy had been committed in the interval between the latter date and the suing out of the commission —

Upon which *Parke* admitted that the objection was answered.

Richardson and *Holt* for the plaintiffs.

Parke for the defendant.

(*a*) See the case of *Clarke* and Others v. *Askew*, in the ensuing note, in which this point was decided. —

1816.

In the case of *Clarke* and others, assignees of *Beverley v. Askeaw*, which was tried *cor.* BAYLEY, J. *Durham Assizes*, 1816, (which was an action of *trover* by the assignees against the sheriff, and an execution creditor,) no notice having been given under the stat. 49 G. 3. c. 121. to dispute the bankruptcy, the question was as to the sufficiency of the proof of the petitioning creditor's debt. The deposition was in the following form: "That *John Beverley*, against whom, &c. was at and before the date of the suing forth of the said commission, justly and truly indebted to this deponent in the sum of 130*l.* 13*s.* 11*d.* for goods sold and delivered," &c. The act of bankruptcy was on the 26th of *July*, and the commission was dated the 9th of *August*.

BAYLEY, J. was of opinion that this deposition was insufficient, since it merely shewed that a debt to the amount of 100*l.* was due at the date of the commission, and did not shew that the bankrupt was indebted to that amount at the time of the act of bankruptcy.

Hullock for the plaintiffs afterwards called a witness who had lived in the service of the bankrupt, who was an inn-keeper, as a waiter, and endeavoured to extract some probable evidence from the nature of the dealings between the petitioning creditor and *Beverley*, to shew that a debt to the amount of 100*l.* had in fact been contracted before the commission of the act of bankruptcy, but failing in this the plaintiffs were nonsuited.

Hullock having in the ensuing term obtained a rule *nisi* for a new

trial. *Raine* and *Parke* afterwards shewed cause against it, contending that it is still necessary, since the 46 G. 3. c. 135. to prove that a good petitioning creditor's debt existed at the time of the act of bankruptcy, *Moss v. Smith*, 1 Campb. 489. and that the effect of the stat. 49 G. 3. c. 121. was merely to make the depositions admissible evidence, *Ellis v. Shirley*, 3 Campb. 124. and that in the present instance they proved nothing more than that a debt was due at the date of the commission.

Hullock contended that it was unnecessary to shew that the debt existed at the time of the act of bankruptcy, but that admitting it to be necessary, it was to be presumed that the commissioners had evidence before them of the existence of the debt at that time, or they could not have declared the party to be a bankrupt.

LORD ELLENBOROUGH. — The evidence was receivable by the commissioners, but it comes to nothing, since it only shews that a debt existed at the time of the commission. I am sorry that such an objection is capable of being sustained, but I do not see how it is to be answered. If any inference could be drawn from the rate at which the goods were supplied, I should be glad to admit it; but the debt is partly due for money lent, which may have been supplied *uno flatu*.

HOLROYD, J. — The same difficulty occurred in a case at *York*, where the deposition was equivocal, and it was held that the deposition ought to be equally satisfactory as if a witness had been examined.

ABBOTT,

ABBOTT, J. — If the position which has been contended for be correct, it would follow, that a party who had once committed an act of bankruptcy might be made a bankrupt afterwards, although he had since paid off the whole of his debts.

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Rule discharged.

WIGAN v. FOWLER and Others.

Same day.

THIS was an action originally brought against seven defendants, who were co-partners, on a promissory note drawn by one of them for the sum of 1000*l.* payable three months after date. The number of the defendants did not appear on the face of the note. One of the co-defendants had pleaded his bankruptcy, and as to him a *nolle prosequi* had been entered; the other defendants had pleaded the general issue.

The statute 15 G. 2. c. 13. s. 5. does not preclude the members of a commercial firm, although exceeding six in number, from drawing bills at a shorter date than six months.

The plaintiff having proved a *prima facie* case, —

Scarlett for the defendants contended, that the note was illegal, having been issued contrary to the provisions of the statute 15 G. 2. c. 13. which enacts, “ That it shall not be lawful for any
“ body politic or corporate whatsoever, erected or
“ to be erected, or for any other persons whatsoever
“ united, or to be united, in covenants or partner-
“ ship, exceeding the number of six persons, in
“ that

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“ that part of *Great Britain* called *England*, to
 “ borrow, owe, or take up any sum or sums of
 “ money on their bills or notes payable at demand,
 “ or at any less time than six months from the
 “ borrowing thereof, during the continuance of such
 “ said privilege to the said Governor and Company,
 “ (of the Bank of *England*) who are hereby de-
 “ clared to be and remain a corporation,” &c.

Garrow, A. G., for the plaintiff, answered, that the intention of the Legislature in framing this Act, was to secure a monopoly to the Bank of *England*, and that it was not intended to apply to any persons who did not issue notes and bills as bankers.

Lord ELLENBOROUGH. — The construction contended for would have the effect of crippling commerce exceedingly.

His Lordship, after adverting to the terms of the Act, intimated his opinion, that the protection meant to be given to the Bank was against Companies of Bankers, and that it was not the intention of the Legislature to prevent co-partners, who were not bankers, from borrowing money or drawing bills for the purposes of commerce.

Leave however was given to *Scarlett* to move the point, in case he should upon deliberation consider that his objection was tenable.

Verdict for the plaintiff.

The

The *Attorney-General* and *Gifford* for the
plaintiff.

Scarlett for the defendants.

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In the ensuing term *Scarlett* moved for a rule to shew cause why the verdict for the plaintiffs should not be set aside, and a nonsuit entered. He contended, that the object of the Legislature in framing the statute 15 G. 2. c. 13. which was also to be collected from the other Statutes on the subject, was to prevent any number of persons, exceeding six, under any colour or pretence whatsoever, from raising money by bills or notes payable at any less time than six months. The statute 15 G. 2. was made, as is expressed in the Act, for the prevention of doubts, and to secure an exclusive privilege to the Bank of England. The statute in terms prohibited any number of persons whatsoever united in partnership, exceeding six, from borrowing or taking up money by any bills at less than six months date. The consequence was, that any number of persons not in partnership might raise money by bills at a shorter date; but that if more than six were in partnership, they could not draw bills at a shorter date. If seven persons in partnership were not prohibited by this clause from drawing any bill of a shorter date, they might draw bills to any amount.

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LORD ELLENBOROUGH, C. J. — I felt great anxiety at the time of the trial, least an alarm should be created in the city of *London*, and therefore was reluctant to save the point. The objection, if it were available, would affect the holder's right of action in every case where it might be contended that the number of the members of the firm by which the bill was drawn exceeded six. Such a decision would virtually incapacitate any number of persons, exceeding six, from entering into a commercial partnership, since it is essential to the very existence of such a partnership, to draw bills of exchange ; and great inconvenience would result, since it would be incumbent on every person before he took a bill, to inquire whether the firm by which it was drawn consisted of more than six members. The statute must be construed *secundum subjectam materiam*, and it was the manifest object of the Legislature, in framing this Act, to protect the Bank of England against rival banks. If a commercial partnership be made a mere colour for raising money by the issue of notes, I agree that the case would fall within the prohibition of the statute.

BAYLEY, J. — Admitting the case to be within the statute, the note would not be void, and the illegality would affect those only who knew the defect. The intention of the Legislature was to protect the Bank of England against other banking companies, and the construction contended for might

might defeat their remedy in almost every instance in which they discounted bills.

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HOLROYD, J. concurred, and said that a similar construction had been adopted in a case under the Coal-brokers Act, which directed that the instrument should be drawn in a particular form under a severe penalty, and upon the objection taken, that one of these had not been drawn in the form required by the statute, it was held that it was not void, but that the effect was to subject the party to a penalty. (a)

Rule refused.

(a) *Query*, Whether under the statute 3 G. 2. c. 26. s. 7, 8. which enacts that lightermen and other buyers of coals on board any ship in the port of London, shall, at the time of the delivery of such coals, pay for the same in ready money, or for such part thereof as shall not be so paid for shall give their promissory notes, expressing the words *value received in coals*, &c. under a penalty of 100*l.* in case of omission.

1816.

EDGAR v. BLICK.

Same day.

The plaintiff having signified by a printed prospectus the terms on which he is ready to engage to perform particular services, may in an action against one who has employed him to render those services under a parol agreement, read the printed prospectus to shew what the terms were, although it is not stamped.

An agreement to procure a situation for a medical man, by the assignment of patients by a third person, to whom a premium is to be paid, is not illegal.

THIS was an action of assumpsit brought by the plaintiff, (who acted as a kind of medical broker) to recover at the rate of two and a half *per cent.* on a premium paid by the defendant, for being admitted into partnership with a medical gentleman, to whom the plaintiff had introduced him.

It appeared that the plaintiff had signified, by means of a prospectus, the terms on which he undertook to introduce applicants to partnerships or situations. Amongst others, was a condition, that the applicant should pay a fee of a guinea upon his first appearance, and should afterwards pay a *per-centage* of two and a half on the premium, when the agreement was signed. — It also appeared, that on an application by the defendant for that purpose, the plaintiff had introduced him to a Mr. *Wright* who was in considerable practice, and to whom the defendant had subsequently paid a premium of 1,670*l.* to be admitted into partnership.

Topping for the defendant objected, that the printed prospectus could not be read in evidence without a stamp, since it contained the terms of the agreement, upon which the plaintiff, founded his claim.

Garrow,

Garrow, A. G. for the plaintiff answered, that the prospectus was not used as evidence of the agreement itself, but only as introductory, and to shew on what terms it was understood between the parties at the time of the parol agreement, that the service was to be performed.

1816.

EDGAR
v.
BLICK.

LORD ELLENBOROUGH. — This was a parol contract, adopting the term of a written proposition previously existing. The prospectus is not evidence of the agreement itself, but had performed its office before the parol agreement was entered into.

By the terms of the prospectus, the remuneration for the plaintiff's services, was to become due upon the signing of the agreement between the parties.

Garrow, A. G., submitted, that it would be sufficient for him to shew, that the defendant had been admitted into partnership with *Mr. Wright*, and that the premium had been paid. — But,

LORD ELLENBOROUGH held, that the plaintiff could not proceed a single step further, without shewing that a written agreement had been signed, and that the most express parol agreement would not supply the deficiency.

A deed of co-partnership between the defendant and *Wright* was then put in.

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v.
BLICK.

Topping objected, that on grounds of policy, an action for this species of brokerage was not maintainable.

LORD ELLENBOROUGH. — I will hear what the terms of the agreement are. I certainly do not approve of selling patients, and handing them over as a species of property; it is indelicate, but I do not think that there is any thing criminal or immoral in it. (a)

Topping afterwards addressed the jury, contending, that the plaintiff was not entitled to the *percentage* which he claimed, since in fact he had performed no meritorious service whatsoever, having done nothing more, than barely introduce the parties to each other; and that as to the demand of a guinea, by way of admission-fee, he contended that there was evidence which shewed that it had been waived.

LORD ELLENBOROUGH left the facts to the jury, who found for the defendant.

Garraw, A. G., and Walford for the plaintiff.

Topping and *V. Lawes* for the defendant.

(a) See *Burne v. Guy*, 4 East. 190. and *Broad v. Jolliffe*, Cro. J. 596.

HARDING and Others v. COOPER.

1816.

THIS was an action by the plaintiffs, as the payees, against the defendant, as the acceptor of a bill of exchange, dated the 11th of *August* 1815.

Wordsworth, the drawer of the bill, being indebted to the plaintiffs, had obtained his discharge under an insolvent act. The plaintiffs afterwards instituted a prosecution against him, for having fraudulently obtained his discharge. A bill of indictment had been found, and the plaintiffs having agreed to take a composition of 2s. 6d. in the pound, with 220*l.* for costs, without taxation, and that a commission of bankruptcy, which had been taken out against *Wordsworth* should be superseded, *Cooper*, the defendant, being the father-in-law of *Wordsworth*, gave the present acceptance for the amount, and the plaintiffs afterwards consented that the indictment should be quashed.

It was contended, on the part of the defendant, that the bill was given for the costs of the prosecution, as well as for the costs of the civil proceedings, upon an agreement to forego the prosecution; and, therefore, that the consideration was illegal.

Lord ELLENBOROUGH. — A stipulation to drop the prosecution, would without doubt be illegal

Same day.

An agreement to forego a criminal prosecution is illegal, but the plaintiff may recover on a bill given by the defendant for the costs of a civil proceeding against B, and the amount of a composition with B, although the plaintiff has instituted a prosecution against B, which he afterwards abandons, unless it be expressly proved that the abandonment of the prosecution formed part of the consideration for the bill.

1816.
 {
 HARDING
 and Others
 v.
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gal (a); but if the party authorized his agent to compound his civil rights only, and after coming to a settlement, the creditors chose to forego the prosecution, the transaction was not illegal.

There being no evidence to shew that the costs of the prosecution were mentioned in the course of the negotiation, and the bill having in fact been given before the indictment was quashed, the plaintiffs obtained a verdict.

Garrow, A. G., and *Pollock* for the plaintiffs.

Gurney and *West* for the defendant.

(a) See *Collins v. Blantern*, 2 Wils. 341.

TRECOTHICK v. EDWIN.

The whole of a promissory note being printed, except the names, dates and sum, and a place of payment inserted at the bottom of the note being also printed, a special presentment there is necessary.

THIS was an action on a promissory note made by the plaintiff.

The note was in the usual form "I promise to pay, &c. at *Barclay, Tritton, and Co.*" The whole of the note was printed, except the names of the parties, the sum, and the date; the words, "at

" *Barclay*,

"*Barclay, Tritton, and Co.*" were at the bottom of the note, and were also printed.

1816.

TRECOTHICK

v.

EDWIN.

It was contended for the defendant, that since the note was made payable at a particular place, specified in printed characters, it was incumbent on the plaintiff, to prove a special presentment.

Lord ELLENBOROUGH held, that it was necessary to prove a special presentment, since the stipulation for payment at a particular place being printed, was to be considered as part of the note having been made at the same time.

A special presentment was afterwards proved. Verdict for the plaintiff.

Richardson for the plaintiff.

Puller for the defendant.

1816.

Ex-parte TILLOTSON.

Same day.

A witness from the country on his arrival in *London* for the purpose of giving evidence in a cause which stands for trial during the sittings, is arrested for debt, the proper course for obtaining his discharge is to bring him before a judge at chambers by writ of *Habeas Corpus*.

SCARLETT stated to the Court, that *Tillotson*, a witness, who came from *Wales*, to give evidence in a cause which stood in the paper, had, upon his arrival in *London*, been arrested for debt, and carried to a lock-up house. The affidavit stated, that his only business in town was to give evidence in this cause.

LORD ELLENBOROUGH intimated his opinion, that under these circumstances, the party ought to be discharged, but that the proper course of proceeding would be, to bring him before a judge at chambers, by writ of *Habeas Corpus*.

See *Aylett's case*, 1 T. R. 63. *Spence v. Stuart*, 3 East. 89. *Lightfoot v. Cameron*, Bl. 113. *Hatch v. Blisset*, 2 Str. 986.

CLUTTERBUCK v. CHAFFERS.

1816.

Saturday,
Dec. 14th.

THIS was an action for the publication of a libel.

The witness who was called to prove the publication of the libel (which was contained in a letter written by the defendant to the plaintiff) stated, on cross-examination, that the letter had been delivered to him, folded up, but unsealed, and that, without reading it, or allowing any other person to read it, he had delivered it to the plaintiff himself, as he had been directed.

Lord ELLENBOROUGH held, that this did not amount to a publication which would support an action, although it would have sustained an indictment; since a publication to the party himself, tends to a breach of the peace.

Verdict for the defendant.

Scarlett and Andrews for the plaintiff.

Garrow, A. G., for the defendant.

In an action for a libel contained in a letter transmitted by the defendant to the plaintiff, by means of a third person, it is a question for the jury whether there has been any publication of the libel, except to the plaintiff himself, and if there has not the defendant is entitled to their verdict.

See 1 *Will. Saund.* 132. n. 2. 3 *Inst.* 74. 2 *Esp. R.* 226. 5 *Mod.* 163.
1 *Hob.* 62. 115. *Starkie on Libel*, 564. *Dr. Edwards v. Dr. Wootton*,
12 *Rep.* 35.

1816.

PEET and Another v. BAXTER.

One employed to sell goods by commission pawns them; the owners of the goods may maintain *trover* against the pawnbroker, after a demand and refusal, although the duplicate has not been tendered according to the stat. 39 and 40 G. 3. c. 99. s. 5.

THIS was an action of trover brought to recover the value of two pieces of cloth.

The plaintiffs, who were *Blackwell-hall* drapers, had entrusted the pieces of cloth in question, along with many others, to a person of the name of *Davis*, to sell for them by commission. *Davis* had pawned the two pieces in question to the defendant, who was a pawnbroker, and who upon demand made had refused to deliver them up. At the time of the demand, the duplicate pawnbroker's ticket was not tendered to the defendant.

Garrow, A. G., for the defendant objected, that the plaintiffs were not entitled to recover without having tendered to the defendant the note which by the 39 & 40 *Geo. 3. c. 99. s. 5.* every pawnbroker is obliged to deliver to the pawner of goods. The 15th section of the same statute enacts, " That any person who shall produce any
 " such note as aforesaid to the person with whom
 " the goods were pawned, as the owner or authorised by the owner thereof to redeem the
 " same, shall be deemed so far as respects the person leaving such goods in pledge, the real owner,
 " and the pawnbroker shall, after receiving satisfaction pursuant to this Act, respecting principal
 " and profit, deliver such goods to the person who
 " shall

“shall so produce the said note, and shall be indemnified for so doing unless he shall have had notice from the real owner,” &c. In order, therefore, to maintain trover, the plaintiffs should have come armed with the proper authority to warrant the pawnbroker in the delivery of the goods. This clause in the statute was meant (he contended) to obviate any inconvenience to the pawnbroker which might result from several persons claiming the same property, and therefore directed that any person producing the proper document, and requiring the delivery of the goods, should be deemed the real owner. The plaintiffs in the present instance had not exhibited the proof of ownership required by the statute, and might, for aught that appeared, by transferring the note, have authorised some other person to make a legal demand.

1816.
 PEET
 and Another
 v.
 BAXTER.

Lord ELLENBOROUGH — If the plaintiffs had claimed title to the goods in privity with the pawner, they must no doubt have produced the note when they made their demand; but they claim by a title which is paramount to that of the pawner. Under the circumstances, it would have been foolish in them to have made use of the duplicates, since it would have been inconsistent with their real claim.

Verdict for the plaintiffs.

Marryatt, Gurney, and Campbell for the plaintiffs.

Garrow, A. G., and Scarlett for the defendant.

1816.

Same day.

WELCH and Another, Assignees of EVAN EVANS,
a Bankrupt, v. SEABORN.

A loan of
money by A
to B is not to
be inferred
from the bare
fact that A de-
livered a sum
of money to B
which A had
borrowed from
another.

THIS was an action by the plaintiffs, as the
assignees of *Evan Evans*, a bankrupt.

In order to establish the petitioning creditor's
debt, the plaintiffs proved by the testimony of one
Simpson, that he, *Simpson*, had at the request of
Rice Evans, (the petitioning creditor) who was a
friend of *Evan Evans*, sold out 100*l.* Navy 5 per
cents. and lent the produce to *Rice Evans*, who
delivered the amount to *Evan Evans*; but on what
account the money was delivered by *Rice Evans* to
Evan Evans did not appear.

LORD ELLENBOROUGH was of opinion that there
was not sufficient evidence to leave it to the jury,
whether this money had been advanced to *Evan
Evans*, by way of loan, since the presumption of
law was, that money when paid is paid in liqui-
dation of an antecedent debt.

The plaintiffs being unable to prove *Rice Evans*
to have been a creditor to the amount of 100*l.*
exclusively of the money so paid, were nonsuited.

Topping and — for the plaintiffs.

Garrow, A. G., for the defendant.

GARNETT v. WOODCOCK and Others.

1816.

THIS was an action by the indorsee of a bill of exchange against the acceptor.

The bill in question was drawn by *Hodson* and Co. in *Lancashire*, upon the defendants in *London*, for the sum of 670*l.* payable to the order of the drawers, and indorsed by the drawers to the plaintiff. The defendants had accepted the bill, payable at *Denison's* and Co. bankers, *London*.

The bill had been presented at *Denison's* and Co. between seven and eight in the evening of the day when it became due, and a boy returned for answer, "no orders."

Campbell for the defendants contended, that since the bill was drawn payable in *London*, the place of payment being in the body of the bill, and had been accepted, payable at *Denison's* and Co. a presentment there was necessary^(a), and that this was not a sufficient presentment, and cited *Parker v. Gordon*, 7 *East*, 385.; *Elford v. Teed*, 1 *Maule & Selwyn*, 28.; there the Court

Same day.

A presentment of a bill at a banker's where it is payable is sufficient, although made after banking hours, provided a person be stationed by the banker to return an answer.

A bill is drawn payable in *London*, and is accepted payable at a particular banker's in *London* (*semble*) a presentment at that banker's must be proved in an action against the acceptor.

(a) See *Sanderson v. Bowes*, 14 *East*. 500. *Wild. v. Rennard*, 1 *Campb.* 425. n. *Callaghan v. Aylett*, 2 *Campb.* 551. 3 *Taunt.* 397. *Fenton v. Goundray*, 13 *East*. 459. *Ambrose v. Hopwood*, 2 *Taunt.* 61. *Bayley on Bills*, 3d Ed. 98.

held,

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held, that the presentment at a banker's, after banking hours, was a nullity, although the presentment in that case had been made by a notary. He admitted that when the bill had been made payable at a merchant's, a presentment after banking hours, where a negative answer had been returned on presentment of the bill, had been deemed to be sufficient; but this was the case of a presentment at a banker's.

LORD ELLENBOROUGH — Bankers do not usually pay at so late an hour; but if a person be left there who gives a negative answer, there is no difference between the case and that of a presentment at a merchant's. I think it is perfectly clear, that if a banker appoint a person to attend in order to give an answer, a presentment would be sufficient if it were made before twelve at night.

Verdict for the plaintiff.

Scarlett and Littledale for the plaintiff.

Campbell for the defendants.

In the ensuing term *Campbell* moved for a rule to shew cause, why there should not be a new trial, and he cited the words of *Lawrence J.* in *Parker v. Gordon*, 7 *East*, 385. where he says, "The party might have refused to take this special acceptance, but if he chose to take the ac-
" ceptance

“ ceptance payable in that manner, payable at the
 “ banker’s, does he not agree to take it payable at
 “ the usual banking-hours ?”

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Lord ELLENBOROUGH. — In that case no answer was given upon the presentment of the bill. Upon the trial I laid down nothing, but that if a servant was stationed for the purpose of giving an answer, it was sufficient. In general there are two presentments, one in the morning, and the other in the evening; but if there be a presentment in the evening, and the party is ready to give an answer, he does all that is necessary. The banker returned an answer by the mouth of his servant, *and non constat*, but that he was stationed there for the express purpose.

Rule refused.

HOPKINS v. APPLEBY.

Monday,
Dec. 16th.

THIS was an action for goods sold and delivered.

The vendee of a merchantable commodity warranted to be of the best quality, proceeds to use it from time to time till the

The defendants who were soap-makers at *Bath*, ordered of the plaintiffs in *London*, eight sarrands

whole has been consumed, when the value of the article can no longer be ascertained, having given no notice to the vendor during this time of any defect in the article, and having deprived the vendor of the means of proving the value of the article by proper tests, the vendee is not entitled to recover on the ground of any alleged defect in the article.

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of Spanish barilla, and four sarrands of salt barilla, which the latter warranted to be of the best quality. The order was given in the middle of *October*, and the barilla reached the place of its destination on the 26th of *December*. Immediately after the arrival of the barilla, the defendants mixed the contents of the eight sarrands together, and soon afterwards proceeded to use it for the manufacturing of soap. Upon trial it appeared, according to the evidence of the defendants, that the Spanish barilla was of so inferior a quality, that it required nearly double the usual quantity in order to complete the process of soap-making; they continued nevertheless to proceed in the use of it, without making any complaint, and in fact made no remonstrance until the whole of the barilla had been consumed in eight successive boilings. The defence now attempted was, that the Spanish barilla was not of the quality stipulated for, and the defendant had paid into Court as much as he contended it was really worth. He insisted that since the article was warranted, he was not bound to return it upon discovering its inferiority, or even to give notice of the defect; and he attempted to shew that the quality could not be ascertained by mere inspection, without actual experiment; and to prove the badness of quality by inference from several failures in the ordinary process of manufacturing soap where this barilla was an ingredient.

On

On the other side evidence was adduced to shew that the article was of the quality warranted for, and that its quality might easily have been ascertained by taste and inspection.

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Lord ELLENBOROUGH. — When an objection is made to an article of sale, common justice and honesty require that it should be returned at the earliest period, and before the commodity has been so changed as to render it impossible to ascertain, by proper tests, whether it is of the quality contracted for. Upon using the first portion of this barilla, and discovering that double the usual quantity was required to attain the object of the process, the defendants ought, without delay, to have intimated to the plaintiffs that the commodity was not of the best quality. Here, on the contrary, not a word was said; but the defendants proceeded, without the least complaint, to use the barilla till the whole was consumed, and it became impossible, by means of proper tests, to ascertain the real value of the article. Lime and tallow are both material ingredients in the manufacture of soap, and to defects in these, and to many other concurring circumstances, the failure which took place might probably be owing, and without making experiments on the article itself, it is impossible, with any degree of certainty, to lay the blame upon the barilla. It was incumbent on the defendants to give the seller an opportunity of establishing his case by the opinion and judgment of

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intelligent

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intelligent men upon the subject, and not to throw a veil and obscurity over it, and debar the party from the fair means of ascertaining the quality. By giving notice in an early stage, the plaintiffs would have been enabled to send down a person of competent skill to examine the cellar in which the commodity was deposited, and to have formed an opinion to what the ultimate failure in the result was to be attributed; this must have depended both on the skill of the manufacturer and the materials which he used. The party who extinguishes the light, and precludes the other party from the means of ascertaining the truth, ought to bear the loss.

Verdict for the plaintiffs.

Garrow, A. G., Gurney, and Comyn for the plaintiffs.

Scarlett and Casberd for the defendants.

WALLER and Another, Assignees of SMITH,
v. DRAKEFORD.

1816.

Same day.

THIS was an action by the plaintiffs as the assignees of *Smith*, a bankrupt, for money had and received to their use as assignees.

After *Smith* had committed an act of bankruptcy, he was arrested by the defendant for a debt which was due to him. *Smith*, to procure his discharge, drew a bill upon *Martin*, which the latter accepted, and *Smith*, having indorsed this bill to the defendant, was liberated. *Martin*, at the time of accepting this bill, was in expectation of receiving goods of *Smith's* into his hands from one *Wright*, and was authorised by *Smith* to sell these goods, and also to receive certain dividends under a commission of bankruptcy against *Deelas*, of whose estate *Smith* was a creditor. *Martin* afterwards received the goods, and sold them, and paid the defendant the amount of the accepted bill when it became due.

It was now contended on the part of the plaintiffs, that as the assignees of *Smith*, they were entitled to recover this money, since it was in effect the money of the assignees in the hands of *Martin*, and was consequently received by the defendant to their use.

A, after committing an act of bankruptcy in order to procure his discharge from an arrest at the suit of B, draws and indorses to B a bill of exchange, which C accepts in expectation of receiving goods of A's into his hands. C receives the goods, sells them, and pays the amount of the bill to B, the assignees of A cannot maintain an action against B for this money as money had and received to their use.

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Lord ELLENBOROUGH. — At this time *Smith*, being a bankrupt, could exercise no disposing power over the goods in the hands of *Martin*. They were the property of the assignees, and the assignees may, if they think proper, bring an action of trover for the conversion of these goods, or they may ratify the act by bringing an action for goods sold and delivered; but they cannot consider the property as changed by the act of a party who held them under no contract or authority.

Plaintiffs nonsuited.

Scarlett and *Campbell* for the plaintiffs.

Garrow, A. G., for the defendant.

In the ensuing term *Scarlett* moved for a rule to shew cause, why there should not be a new trial, stating at first the same grounds as upon the trial of the cause.

But the Court refused the motion, and observed, that attempts had of late been made to stretch the action for money had and received beyond its due limits; it was a devouring kind of action, which, if encouraged, would swallow up all others.

Scarlett then moved on a different ground from that on which he stood at the trial. He contended,
 2 that

that since the bill was accepted by *Martin*, in favour of *Smith*, after he had committed an act of bankruptcy, the property in the bill vested immediately in the assignees, and that they might have maintained an action of trover for it against the defendant; but if they could have maintained an action of trover, it was competent to them to waive the tort, and to proceed for money had and received.

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But the Court observing, that this had not been urged at the trial, and that this was an attempt to carry the doctrine of waiving the tort to an unwarrantable length,

Refused the rule.

ATWOOD and Another v. CROWDIE and Another. Tuesday,
Dec. 17th.

THIS was an action by the plaintiffs, as the indorsees of three bills of exchange, drawn by *Kent and Co.* upon, and accepted by the defendants, payable to *Mattingley and Co.* and indorsed by the latter to the plaintiffs.

A and Co.
bankers in the
country being
pressed by B
and Co.
bankers in
town, to whom
they are in-

debted, to send up any bills that they can procure, transmit *for account* an accommodation bill accepted by D; when the bill becomes due, the balance is in favor of B and Co. but the bills are not withdrawn, and afterwards the balance between the houses turns considerably in favor of A and Co. and is so when B and Co. become bankrupts: A and Co. are entitled to recover against the acceptor.

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It

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 and Another.

It appeared that a material alteration had been made in one of these bills, which put it out of question. The two others, which bore date *December* 16, 1813, became due on the succeeding 19th of *March* and 19th of *April*, respectively. The plaintiffs were the *London* bankers of *Mattingley* and Co., who were bankers at *Abingdon*, and also at *Wantage*; and the latter being indebted to the former, and being pressed by them to send any bills up that they could procure, sent up nine bills *for account*, in which were included the bills in question, which had been accepted by the defendants for the accommodation of *Mattingley* and Co. Upon the evidence adduced for the defendants, it appeared that the balance of the cash account between the plaintiffs, and *Mattingley* and Co., was very considerably in favour of the latter, both on the 19th of *March* 1814, and the 19th of *April* 1814, when the two bills in question respectively became due. It also appeared, that there were periods subsequent to these dates, when the general account, including both cash and engagements, was in favour of *Mattingley* and Co.; but they afterwards failed, and at the time of failure, were indebted to the plaintiffs in a sum exceeding the principal and interest of the bills.

Scarlett for the defendants, contended, that the object of transmitting the bills in question, was in order to cover the then existing balance, and that such balance having been satisfied in *March* and *April*, the plaintiffs' claim on these bills was ex-

tinguished, and could not afterwards be revived by a subsequent fluctuation of the account in favour of the plaintiffs against *Mattingley* and Co. That the general principle applied, that where an accommodation bill is indorsed after it is due, the indorsee stands in the same situation with that in which the indorser himself would have stood ; and that therefore, in the present case, the defendants, having accepted the bill for the accommodation of *Mattingley* and Co. and the plaintiffs having no claim upon these bills when they became due, they could not afterwards acquire a fresh claim upon new advances to *Mattingley* and Co. any more than they could by a fresh indorsement by *Mattingley* and Co.

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and Another.

LORD ELLENBOROUGH. — It appears, from the letter in which the bills were sent by *Mattingley* and Co. to the plaintiffs, that they were sent *on account*, which means, the then floating account. It is clear, that there was a period, when the plaintiffs' lien ceased to attach, and when the bills might have been redeemed, but they were not reclaimed, and by allowing them to remain in the hands of the plaintiffs, the lien revested, when, upon fresh advances made, the balance turned in favour of the plaintiffs.

Verdict for the plaintiffs, for the principal and interest.

Garrow, A. G., *Marryat* and *F. Pollock* for the plaintiffs.

Scarlett and *Casberd* for the defendants.

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and Another.

In the ensuing term, *Scarlett* moved for a rule to shew cause why there should not be a new trial, contending, that the bills had not been sent for the purpose of securing a fluctuating balance, but on account of the then existing debt ; and that after that object had been satisfied, the plaintiffs became the proprietors of the bills, after they were due, and that *Mattingley* and Co. could not at that time make the plaintiffs proprietors, without being subject to the equity under which they themselves held the bills.

Lord ELLENBOROUGH. — Upon what terms *Crowdie* and Co. originally accepted the bills, does not appear, but the circumstances indicate what the nature of the transaction was ; their not withdrawing the bills, or demanding them back, shews that they considered themselves to be sureties.

Scarlett then submitted that the plaintiffs were not entitled to interest on the bills, from the time when they became due, but only from the time when the balance turned in favour of the plaintiffs.

But the Court answered, that the balance afterwards exceeded both the principal and interest due on the bills.

Rule refused.

MOORE and Others, Assignees of SHEATH and
Others v. VOUGHTON.

1816.

Same day.

THIS was an action of assumpsit by the plaintiffs, as the assignees of *Sheath, Steel, and Wrag*, bankrupts, against the defendant, for money lent, and for interest.

In an action to recover the interest upon monies advanced to the defendant by a banking house, it is not sufficient to shew that it was the general custom of the house to charge interest calculated upon half-yearly rests, without also shewing that the defendant knew that such was the practice.

It was contended, that with respect to such sums as should be proved to have been advanced to the defendant on his own private account, the plaintiffs were entitled to recover interest, calculated upon half-yearly rests, according to the universal practice of the house. — But,

Lord ELLENBOROUGH held, that this claim could not be supported, unless it could be proved, that the defendant knew that it was the practice to charge interest from such rests.

The plaintiffs had a verdict for the principal sums advanced, with interest, calculated upon each sum, from the time of the advance, but without rests.

Garrow, A. G., Scarlett and Denman for the plaintiffs.

Clarke and Reader for the defendant.

1816.

HOLME v. GREEN.

Same day.

In order to take a case out of the statute of limitation in an action on a promissory note, it is not sufficient to shew a payment by a joint maker of the note to the payee within six years, so as to throw it upon the defendant to shew that the payment was not made on account of the note.

An acknowledgment by one partner to bind another in such case must be clear and explicit.

THIS was an action by the indorsee, of a promissory note, against the maker.

The note, bearing date 25th March 1805, was made jointly by *Green*, and *Salter*, who was dead, for the payment of 300 l. to *Holme* and *Wilson*, and by them indorsed to *Holme*, the plaintiff, on his private account.

The defendant had pleaded the general issue, and the statute of limitations. Replication that the suit was commenced within six years after the promise.

Salter, being the clerk of *Holme* and *Wilson*, the latter advanced to him the sum of 600l. for securing the re-payment of 300l. of which the note in question was given by *Salter*, and by *Green*, the defendant, as his surety. In order to take the case out of the statute, the plaintiff relied principally on the fact, that on the 19th of February 1810, a cheque had been paid by *Holme* and *Wilson*, to *Salter*, who was still in their service, and that this had been paid in, on *Holme*'s, the plaintiff's private account; it was also in evidence, that when the defendant was applied to for payment of the note, he said he understood that it had been paid.

paid. It was contended, that the payment of the 50*l.* cheque on the account of the plaintiff, must be attributed to his claim upon the bill, unless it could be shewn by the defendant, that some other account existed between the parties.

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GREEN.

Lord ELLENBOROUGH. — There would be no such thing as the statute of limitations, if this doctrine were to prevail. An acknowledgement to bind a partner, ought to be clear and distinct. This would be an extravagant extension of the case of *Whitcomb v. Whiting*. (a) Unless there be an express and unequivocal acknowledgement of an existing debt by one partner, it will not bind the other. To admit evidence to shew to what particular account a payment related so as to make it operate as an acknowledgement, would be attended with all the difficulty and mischief of opening and unsettling complicated accounts. If this were to be admitted, it would operate as a recipe for taking a case out of the statute, by means of obscure and unsatisfactory evidence. I shall certainly intimate to the jury, that this is not enough to take the case out of the statute.

His Lordship advised the jury accordingly, and they found a verdict for the defendant.

Gurney and Walton for the plaintiff.

Scarlett and Spankie for the defendant.

(a) Doug. 652.

1816.

CAMPBELL v. THOMPSON.

Wednesday,
Dec. 18th.

A having shipped goods on board of a vessel which is driven into a foreign port by stress of weather, part of these goods is sold by the captain to defray the expences of repairing the vessel. A is entitled to deduct from the demand, for freight, the sum for which the goods have been sold. — And the circumstance of the ship-owners having, during the voyage, assigned the freight to a third person, makes no difference.

The master of a vessel is not justified in selling any part of the cargo for the repairs of the ship in a foreign port, except in cases of urgent necessity.

THIS was an action of special assumpsit for not indemnifying the plaintiff against a bill of exchange accepted by him under the following circumstances: —

The plaintiff had shipped goods on board a vessel, which, by stress of weather, was driven into the port of *Halifax*. Part of these goods (without any urgent necessity) had been sold there by the captain, in order to defray the expences of repairing the ship. Whilst the vessel was engaged in this voyage, *Metcalf*, the owner, made an assignment of the freight to the defendant. On the ship's arrival in the port of *London*, the defendant refused to deliver to the plaintiff the residue of his goods, unless he paid freight for the whole. The plaintiff insisting that he had a right to set off the sum for which the goods had been sold against the demand for freight, an agreement was mutually entered into, by which the plaintiff agreed to pay the freight of the goods, *per William*, when it should become due, and agreed also to accept a bill for the amount; the defendant engaging to indemnify the plaintiff, in case it should appear between that time and the time when freight should become

due,

due, that the plaintiff had any claim for deduction. The action was founded upon a breach of this undertaking.

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It was contended on the part of the defendant, that the captain had a right to sell a part of the cargo for the purpose of repairs ; and that assuming that the selling the goods amounted to a tort, it was not competent to the plaintiff to waive the tort, so as to set-off the amount for which the goods were sold : that at all events such a set-off could not be supported against the defendants, who were assignees of the freight for a valuable consideration.

LORD ELLENBOROUGH. — I am clearly of opinion that the plaintiff was entitled to set-off the sum for which the goods were sold. The defendant could not stand in a better situation than *Metcalfe*, the owner of the ship. The plaintiff would not have been bound to bring *trover* against him, but might have waived the tort, and brought an action for the money for which the goods were sold, which was obviously the subject of a set-off. I desire that it may not go abroad, that the master (as has been contended) has any right to dispose of goods on board his ship, except indeed in cases of urgent necessity. (a) There is a tenuity of authority on this subject, but this has been so decided in a case which was tried before C. J. *Eyre*.

(a) See *Abbott on Shipping*, part iii. c. 3. s. 10. and the case of the *Gratudine Mazzola*, 3 Rob. A. R. 240.

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Upon being requested to save the question for the opinion of the Court, his Lordship said, that both the justice of the case, and the rule of law, conspired to the same point, and that to save the question would imply that he entertained doubts upon it.

Verdict for the plaintiff.

Garrow, A. G., Scarlett, and Ross for the plaintiff.

Gurney and Richardson for the defendant.

In the ensuing term *Gurney* moved for a rule to shew cause why there should not be a new trial. He contended that the plaintiff was bound to resort to his action to recover damages for the unascertained value for which the goods might have been sold had they reached the place of destination; and he cited the case of *Alers and Others v. Tobin and Others, Abbott, 243. 3d ed.* and that since the damage had not been ascertained before the freight became due, there had been no breach of the undertaking to indemnify: —

But the Court held that this was not a case of unascertained damage, since the only question was as to the value of the goods, the plaintiff being entitled to deduct as much as the goods were worth at the time of sale; and that since the facts which

which entitled the plaintiff to claim a deduction existed before the freight became due, and the plaintiff did not insist upon any new ground of claim, the plaintiff was entitled to retain his verdict.

Rule refused.

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JONES v. BOYCE.

Friday,
Dec. 20th.

THIS was an action on the case against the defendant, a coach proprietor, for so negligently conducting the coach, that the plaintiff, an outside passenger, was obliged to jump off the coach, in consequence of which his leg was broken.

If through the default of a coach proprietor, in neglecting to provide proper means of conveyance, a passenger be placed in so perilous a situation as to render it prudent for him to leap from the coach, whereby his leg is broken, the proprietor will be responsible in damages, although the coach was not actually overturned.

It appeared that soon after the coach had set off from an inn, the coupling rein broke, and one of the leaders being ungovernable, whilst the coach was on a descent, the coachman drew the coach to one side of the road, where it came in contact with some piles, one of which it broke, and afterwards the wheel was stopped by a post. Evidence was adduced to shew that the coupling rein was defective, and that the breaking of the rein had rendered it necessary for the coachman to drive to the side of the road in order to stop the career of the horses. Some of the witnesses stated that the wheel was forced against the post with great vio-

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lence;

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lence; and one of the witnesses stated, that at that time the plaintiff, who had before been seated on the back part of the coach, was jerked forwards in consequence of the concussion, and that one of the wheels was elevated to the height of eighteen or twenty inches; but whether the plaintiff jumped off, or was jerked off, he could not say. A witness also said, I should have jumped down had I been in his (the plaintiff's) place, as the best means of avoiding the danger. The coach was not overturned, but the plaintiff was immediately afterwards seen lying on the road with his leg broken, the bone having been protruded through the boot.

Upon this evidence, Lord ELLENBOROUGH was of opinion, that there was a case to go to the jury, and a considerable mass of evidence was then adduced, tending to shew that there was no necessity for the plaintiff to jump off.

Lord ELLENBOROUGH, in his address to the jury, said, — This case presents two questions for your consideration; first, whether the proprietor of the coach was guilty of any default in omitting to provide the safe and proper means of conveyance, and if you should be of that opinion, the second question for your consideration will be, whether that default was conducive to the injury which the plaintiff has sustained; for if it was not so far conducive as to create such a reasonable degree of alarm and apprehension in the mind of the plaintiff, as rendered it necessary for him to jump down from
the

the coach in order to avoid immediate danger, the action is not maintainable. To enable the plaintiff to sustain the action, it is not necessary that he should have been thrown off the coach; it is sufficient if he was placed by the misconduct of the defendant in such a situation as obliged him to adopt the alternative of a dangerous leap, or to remain at certain peril; if that position was occasioned by the default of the defendant, the action may be supported. On the other hand, if the plaintiff's act resulted from a rash apprehension of danger, which did not exist, and the injury which he sustained is to be attributed to rashness and imprudence, he is not entitled to recover. The question is, whether he was placed in such a situation as to render what he did a prudent precaution, for the purpose of self-preservation. — His Lordship, after recapitulating the facts, and commenting upon them, and particularly on the circumstance of the rein being defective, added: — If the defect in the rein was not the constituent cause of the injury, the plaintiff will not be entitled to your verdict. Therefore it is for your consideration, whether the plaintiff's act was the measure of an unreasonably alarmed mind, or such as a reasonable and prudent mind would have adopted. If I place a man in such a situation that he must adopt a perilous alternative, I am responsible for the consequences; if, therefore, you should be of opinion, that the reins were defective, did this circumstance create a necessity for what he did, and did he use proper caution

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and prudence in extricating himself from the apparently impending peril. If you are of that opinion, then, since the original fault was in the proprietor, he is liable to the plaintiff for the injury which his misconduct has occasioned. This is the first case of the kind which I recollect to have occurred. A coach proprietor certainly is not to be responsible for the rashness and imprudence of a passenger; it must appear that there existed a reasonable cause for alarm.

The jury found a verdict for the plaintiff. —
Damages 300*l*.

Garrow, A. G., and *V. Lawes* for the plaintiff.

Topping, *Scarlett*, and *Espinasse* for the defendant.

Same day.

OLIVIERSON *v.* COLES and Others.

An agreement for selling out omnium to be replaced in stock is not illegal.

THIS was an action on a special undertaking in consideration that the plaintiff would sell out Omnium to the amount of 2000*l*., to replace the same in stock, or to give the plaintiff the current price for it if he required it.

On

On the part of the defendants it was objected, that the contract was illegal, since it amounted to an agreement to replace stock in consideration of selling out omnium, which was not stock, and which might never eventually become stock; since if default were to be made in one payment, the previous payments would all become forfeited, and therefore whether omnium might eventually become stock rested upon a contingency.

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and Others.

Lord ELLENBOROUGH. — A person who has omnium is potentially in possession of stock. The case certainly differs from that of a sale of actually existing stock, but it does not come within the mischief intended to be guarded against by Sir *John Bernard's* Act. Do not consider me as entertaining any doubt upon the subject; but if you wish to have the point considered you may (a).

Verdict for the plaintiff.

Marryatt, Gurney, and Tindal for the plaintiff.

Garraw, A. G., and Parke for the defendants.

(a) The point was not moved. — See *Brown v. Turner*, 2 Esp. 631. where omnium was held by Lord *Kenyon* to be stock within the meaning of the Stock-jobbing act, see the statute 7 G. 2. c. 8.

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ALDRIDGE v. BELL.

Same day.

An insured vessel arrives at the port of *Kinsale* on the 24th of *November*; on the 14th of *December*, a second survey is had, when it is found that the expences of the repairs will exceed the value of the ship, notice of abandonment to the insurers in *London* on the 6th of *January* is too late.

THIS was an action on a policy of insurance upon the ship *Lion*, at and from *Ferrol* to *London*.

One question was, Whether an abandonment had been made in time. The *Lion* arrived at *Kinsale* on the 24th of *November*. The cargo was taken out on the 1st of *December*, and a survey was had on the 2d, and also another on the 14th of *December*, when it was found that the repairs would exceed the value of the ship. The course of communication between *Kinsale* and *London*, where the insurers resided, was usually four or five days. The notice of abandonment was given on the 6th of *January*.

Lord ELLENBOROUGH held, that the abandonment was clearly out of time.

Verdict for the plaintiff, subject to the question, whether 30 per cent. was sufficient to cover a partial loss.

Scarlett and *Littledale* for the plaintiff.

Garrow,

Garrow, A. G., and *Richardson* for the defendant.

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ALDRIDGE
v.
BELL.

See *Mitchell v. Edie*. 1 T. R. 608. *Park on Insurance*, tit. Abandonment. *Anderson v. The Royal Exchange Assurance Company*, 7 East. 38. *Barker v. Blakes*, 9 East. 283. Note, in the above case there did not appear to have been such a loss as entitled the assured to abandon.

MACHELL and Others v. KINNEAR.

THIS was an action by *Machell*, *Boucher*, and *Birkbeck*, as the indorsees of a bill of exchange, against the defendant as the indorser.

The bill in question was dated on the 21st of August 1815, and was drawn by *Corbet* on *Goldie*, for the payment of 400*l.*, six months after date to his own order, indorsed by *Corbet* to *Kinnear*, the defendant, and indorsed by the latter in blank.

The principal question was, whether under the circumstances, such a right had been transferred to the plaintiffs as entitled them to sue upon the bill.

It appeared that *Machell* and *Boucher* were two of the partners of which the firm of *Langton* and *Co.* firm, maintain an action against the indorser, without some evidence of the transfer of the bill to them as trustees by the firm, by delivery or otherwise.

A bill of exchange is, by the direction of the payee, indorsed in blank, and delivered to A, B and Co. who are bankers, on the account of the estate of an insolvent, which is vested in trustees for the benefit of his creditors. A and B, two of the members of the firm, and also trustees, cannot, conjointly with a third trustee, who is not a member of the

1816.

MACHELL
and Others
v.
KINNEAR.

Co. consisted. *Machell*, *Boucher*, and *Birkbeck*, the three plaintiffs, were the trustees of the estate of *Holder*, an insolvent, for the benefit of the creditors, *Birkbeck* not being a member of the firm of *Langton* and Co. The defendant being indebted to the estate of *Holder*, transmitted the bill in question to his clerk in *Liverpool*, with directions to deliver it to *Langton* and Co. on the account of *Holder's* estate, and either to indorse it, or to give them a letter of guarantee to secure the payment. The clerk accordingly indorsed it in blank, and delivered it to *Langton* and Co.

Garrow, A. G., for the defendant, objected, that it was not competent to two of the firm of *Langton* and Co., to associate with themselves a third person, who was a stranger, for the purpose of bringing an action on the bill, without shewing that the bill had been transferred by *Langton* and Co. to the plaintiffs thus associated.

Marryat for the plaintiffs contended, that since the bill had been indorsed in blank, it was competent to any number of persons to associate together for the purpose of bringing an action; and he cited the case of *Ord* and Others, *v. Portal*, 3 *Camp.* 239; where it was held, that an indorsement in blank conveyed a joint right of action to as many as agreed to sue upon the bill.

LORD ELLENBOROUGH.—The bill having been indorsed, and delivered to *Langton* and Co., ac-
4
cording

according to *Kinnear's* direction, *Langton* and Co. had authority to appropriate it. Since it was paid to them on account of *Holder's* estate, if they had received the amount, it would have been money had and received by them on account of the estate ; but the evidence as it stands, proves the interest in the bill to be in *Langton* and Co. It would be sufficient to prove that *Langton* and Co. consented to appropriate the bill to the three plaintiffs as trustees. If *Langton* and Co. had indorsed it to the plaintiffs, the right to sue would have been clear, or they might have transferred the right by a delivery of the bill ; but, without some evidence of this kind, the right to sue still remains in *Langton* and Co. Had it not been for the evidence of the particular transfer to *Langton* and Co., an indorsement in blank might have entitled the parties who bring the action to recover.

1816.
MACHELL
and Others
v.
KINNEAR.

Plaintiffs nonsuited.

Marryat and *Chitty* for the plaintiffs.

Garrow, A. G., and *Spankie* for the defendant.



1816.

SNOW v. ALLEN.

A plaintiff, who, acting under what he conceives to be sound advice, takes the defendant in execution, after he has taken the defendant's bail in execution, is not liable to an action for maliciously arresting the defendant, although, previous to the arrest, he had notice from the defendant that his proceeding was illegal.

THIS was an action on the case, for maliciously and without any reasonable or probable cause, suing out a writ of *testatum capias ad satisfaciendum* against the plaintiff; upon which he was arrested, and detained in prison, until, &c.

It appeared, that in *Easter* term 1807, the defendant, who was a tailor, commenced an action against the plaintiff, in which he obtained judgment in *Michaelmas* term 1809, for the debt and costs. — The plaintiff, being then absent from *England*, the defendant proceeded to judgment against *Raymond*, *Snow*, and *Mitchell*, the plaintiff's bail, and took them in execution. In *November* 1813, the defendant sued out a *capias ad satisfaciendum*, and a *testatum ca. sa.* against the plaintiff, on the latter of which he was arrested.

The plaintiff's attorney, previous to the arrest, gave notice to the defendant's attorney, that it was irregular to proceed against the plaintiff, after taking his bail in execution.

The defendant's attorney, however, relying on *Higgins's* case (*a*). and an opinion of a special

(a) *Cro. J.* 320. 2 *Bulst.* 68. 10 *Fin. Abr.* 378.

pleader,

pleader, persisted in his course of proceeding against the plaintiff; and he was detained in custody till *Hilary* term 1814, when the Court of *King's Bench* made the rule absolute for his discharge. (a)

1816.

SNOW

v.

ALLEN.

LORD ELLENBOROUGH. — How can it be contended here, that the defendant acted *maliciously*, he acted *ignorantly*.

Garrow, A. G. He proceeded to arrest, after full notice of the irregularity of his proceedings.

LORD ELLENBOROUGH. — But he was acting under, what he thought, was good advice; it was unfortunate that the attorney was misled by *Higgins's* case; but unless you can shew that the defendant was actuated by some purposed malice, the plaintiff cannot recover.

The plaintiff being unable to carry the case further, was nonsuited.

Garrow, A. G., and *Deacon* for the plaintiff.

Scarlett and *Gaselee* for the defendant.

(a) See the case, 2 *Maule & Selwyn*, 341.

1816.

Monday,
Dec. 23d.Goods sold are
described in the
invoice, as*scarlet cut-
tings*, a war-
ranty is to be
inferred that
the goods an-
swered the
known mer-
cantile de-
scription of
*scarlet cut-
tings*.

In an action
of assumpsit it
is alleged as a
breach, that
certain goods
sold and de-
livered to the
plaintiff, and
warranted to
be scarlet cut-
tings, were not
scarlet cuttings,
per quod, they
became and
were of no use
or value to the
plaintiff. The
plaintiff is en-
titled, without
any further
allegation of
special damage,
to recover as
much as the goods would have been worth to him had the contract been faithfully per-
formed by the defendant.

BRIDGE v. WAIN.

THIS was an action of special assumpsit.

The declaration alleged, a purchase by the plaintiff from the defendant, of scarlet cuttings, to the amount of 904*l.* and all the counts, except the sixth and last count, alleged a special warranty by the defendant, that the scarlet cuttings were of a merchantable quality; the sixth count alleged an undertaking that they were scarlet cuttings.

It appeared in evidence, that scarlet cuttings consisted of small pieces of scarlet cloth, in which the *English* dealt with the *Chinese* to a considerable extent. It was also proved, that scarlet cuttings, were understood, in the market, to mean, cuttings of cloth only, without any admixture of serge or other materials, and that the article sold to the plaintiff did contain a quantity of serge, and that a part consisted of mere shreds of cloth much smaller than those usually sent, and that goods of this description would be very unprofitable, if not wholly unsaleable in *China*, and that a sale of such, without examination, might prove very detrimental to the trader, who would afterwards be regarded

with

with great suspicion in the *Chinese* market. No special warranty was proved, but it appeared, that in the bill of parcels, the goods were described as *scarlet cuttings*.

1816.
BRIDGE
v.
WAIN.

Upon its being objected that no warranty had been proved, —

LORD ELLENBOROUGH. — If they were sold by the name of scarlet cuttings, and were so described in the invoice, an undertaking that they were such must be inferred. To satisfy an allegation, that they were warranted to be of any particular quality, proof must be given of such a warranty, but a warranty is implied that they were that for which they were sold.

Scarlett afterwards addressed the jury on the subject of damages; he also submitted to the Court, that since the plaintiff could not recover on any count except the sixth, since all the others alleged an express warranty, and since the breach alleged in the sixth count, was merely that “they were not scarlet cuttings, but shreds, serges, &c. and became and were of no use or value to the said plaintiff” the plaintiff was not entitled to recover any special damage whatever, no special damage having been alleged in the sixth count, and that he could not recover more than the mere difference in value between the article delivered, and that contracted for without reference to any specific
and

1816.

BRIDGE

v.

WAIN.

and particular loss resulting from the loss of sale in *China*.

LORD ELLENBOROUGH (to the jury). — The difficulty in this case, consists, in ascertaining the damages sustained by the plaintiff, in consequence of his not having been furnished with proper scarlet cuttings; we have no account of the sum actually produced by the sales. Under the words of the sixth count, that they were of no use or value, you are to consider, the effect of their being of no use or value in *China*. I am decidedly of opinion that by value, is to be understood, the value which the plaintiff would have received had the defendant faithfully performed his contract. — After his Lordship had fully commented upon all the facts of the case, the jury found a verdict for the plaintiff on the sixth count; damages 350*l*.

Garrow, A. G., and Campbell for the plaintiff.

Scarlett and V. Lawes for the defendant.

In the ensuing term, *Scarlett* moved for a new trial, on the ground of a misdirection by his Lordship, on the subject of damages, but the Court refused a rule to shew cause, being of opinion that the plaintiff was entitled to recover under the sixth count, all the loss which he had sustained, in consequence of not having in *China* those goods which the defendant had undertaken to supply.

HOPPER and Others, Assignees of MOWBRAY and Others, and MASON and Others v. RICHMOND.

1816.

Same day.

THIS was an action by the assignees of *Mowbray, Hollingworth, and Wetherell*, who had been declared bankrupts, conjointly with *Mason* and others, who had been in partnership with the three bankrupts, but who remained solvent, against the defendant, *James Richmond*, on a promissory note made by him, and indorsed to *William Richmond*, who had indorsed it over to the firm of *Mowbray and Co.*

If in an action by the assignees of a bankrupt it be proved that an act of bankruptcy was committed before the commission issued, it will be sufficient, although the act was committed so recently before the commission, and at such a distance from *London* that no knowledge of it could have reached *London* at the time when the commission was sued out.

No notice having been given of an intention to dispute the bankruptcy, the depositions were read, from which it appeared that *Wetherell* (one of the bankrupts,) had committed an act of bankruptcy, on the 21st of *July*, at *Doncaster*, the commission bearing dated the 22d of *July*, the day after.

Tindal for the defendant objected, that this act of bankruptcy could not support the commission, since at the time of suing out the commission, this act of bankruptcy could not have been known in *London*.

LORD ELLENBOROUGH. — If an act of bankruptcy has in fact been committed previous to the suing out of the commission, I shall not look to the time

1816. time in which the news of that act would reach
 HOPPER *London.*
 v.
 RICHMOND.

By the terms of the note the defendant undertook to pay legal interest on demand.

Lord ELLENBOROUGH held that this must mean from the date of the note.

Verdict for the plaintiffs.

Scarlett and Richardson for the plaintiffs.

Tindal for the defendant.

Same day.

EVERTH v. TUNNO.

An insured vessel is warranted to carry a *French* licence, it is not sufficient to shew that the captain of

THIS was an action on a policy of insurance on ship and freight at and from *Bordeaux* to *London*, with a warranty that she should carry *British* and *French* licences, loss alledged by detention of the *French* government.

the vessel in 1813, before the vessel sailed from *Dantzic*, received a document which purported to be a *French* licence, without shewing that he received it from some officer or person in authority under the *French* government; but proof that after the arrival of the vessel at *Bordeaux*, she was allowed to remain there for upwards of a month after an inspection of the *French* licence and other documents by the officer of the *French* government is *prima facie* evidence that the document is genuine.

In

In 1813 the vessel sailed from *Dantzic*, under a licence from the *French* government (*a*), under the authority of which she proceeded from *Dantzic* to *London*. After taking in a cargo of goods, she sailed for *Bourdeaux* (having obtained a *British* licence) and went up the river to the town of *Bourdeaux*, March 16th, 1814: whilst the vessel was proceeding up the river, her papers were seized by officers of the *French* government, but they were afterwards returned, and the vessel sailed up the river, and afterwards proceeded to take in her homeward cargo. On the 25th of *March* she had discharged her ballast, and carpenters were employed to prepare for the homeward voyage, when two custom-house officers came on board, and seized the *French* licence, and on the 26th of *April* orders were given that the vessel should proceed further up the river.

1816.

EVERTH
v.
TUNNO.

In proof of the warranty that the vessel had a *French* licence, the plaintiff relied upon evidence that the document produced (which purported to have been signed by *Bonaparte*, and countersigned by his minister) had been received by the captain from the owners of the vessel at *Dantzic*. It was also contended, that the permitting the vessel to remain in the harbour, and to proceed without molestation in providing for the homeward voyage

(a) A special case was made for the opinion of the Court of *K. B.* upon the construction of this licence.

1816.

EVERETH

v.

TUNNO.

after the licence had been inspected, was a recognition of its authority by the *French* government.

LORD ELLENBOROUGH. — If the captain had received this document from a person of *French* authority at *Dantzic*, it might have been admissible on that ground, because it is probable that such a document would have been transmitted by the *French* government to some person in authority at *Dantzic*; but it is not sufficient to shew that it came out of the possession of the owners. Since, however, the *French* government had possession of the papers in *March*, and no obstruction took place till the 26th of *April*, I think there is *primâ facie* evidence that the document is genuine.

Scarlett for the defendant afterwards objected that the warranty had not been complied with, since within the space of twenty-four hours after the arrival of the vessel within the port of *Bourdeaux*, the licence had been taken away; he insisted that the warranty ought to be strictly construed, and that it was essential that the licence should have been under the dominion of the owners when the policy attached, that is for twenty-four hours after the arrival of the vessel.

But LORD ELLENBOROUGH expressed a decided opinion that the policy attached the moment the vessel arrived within the port.

Verdict for the plaintiff, subject to a special case on the construction of the *French* licence.

1816.

EVERTH

v.

TUNNO.

Garrow, A. G., and *Taddy* for the plaintiff.

Scarlett, *Gurney*, and *Marryatt* for the defendant.

REX v. COHEN.

Friday,
Dec. 27th.

THIS was an indictment for perjury.

The indictment contained two counts. The first count alleged, that on, &c. a certain cause between *Thompson* and *Forman*, plaintiffs, and *B. Jacob*, the defendant, came on to be tried, and was tried, and that the present defendant, *Cohen*, was then and there duly sworn to give evidence between the said parties. That it became a material question whether a bill of exchange, shewn to the defendant had been drawn and signed by *Bernard Jacob*, the drawer, in *London*. The perjury was assigned on evidence given by the defendant that he saw the bill of exchange drawn and signed in *London*, which evidence was alleged to have been given with intent to injure the plaintiffs. —

If a co-plaintiff die, the suit will be abated, unless the death be suggested according to the stat. 8 and 9 W. 3. c. 11. s. 6.

And therefore if a co-plaintiff die after issue joined, a trial without such suggestion on the record, would be extra-judicial; and consequently no perjury could be assigned upon

any false evidence given at such trial.

1816.

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v.

COHEN.

The second count alleged, that on, &c. a certain issue, before then duly joined between the parties, came on in due form of law to be tried.

It appeared that *Thompson* and *Forman* had brought an action against *Bernard Jacob*, as the acceptor of a bill of exchange, purporting to have been drawn by *Bernard Jacob* the younger, at *Constantinople*, in favour of *Phillip Phillip*, and indorsed by the latter to the plaintiffs.

The plaintiffs declared, in *Hilary* term 1815: on the 30th of *April* 1815 after issue had been joined, *Thompson*, one of the plaintiffs, died, and the cause came on for trial on the 10th of *May*, no suggestion having been entered on the record of *Thompson's* death. *Cohen*, the present defendant, was called upon that occasion, as a witness for the plaintiffs, and he, after proving the signatures of the drawer and acceptor, swore that he saw the bill in question drawn, and signed in *London*; and upon this evidence, the plaintiffs were nonsuited, and upon this also the present charge of perjury was founded.

Topping and *Lawes*, for the defendant, contended, that the indictment, under these circumstances, could not be supported. The cause came on to be tried, on the 10th of *May* 1815, before which time the co-plaintiff, *Thompson* had died; but the cause had proceeded just as if he had been alive, without any suggestion of his death upon the record. At

common law, the cause abated by the death of one of the parties. For though an opinion once existed, that where an action had been brought by two partners, it did not abate by the death of one of them; and, although that was the opinion of a very learned person, it was found that the doctrine could not be supported, and therefore the statute of *William* was framed (*a*), which gave authority on the death of one being suggested on the record to the Court to proceed. But that, since the death had not been suggested in this case, the proceedings were at an end by the death of one of the plaintiffs. The last general return day was on the 5th of *May*, the term ended on the 8th, and the cause was tried on the 10th. Then as to the allegation on the record, it was clear, that the oath must be a false one, taken in the course of some judicial proceeding, but by the death, the cause was at an end without a suggestion, according to the statute of *William*. On the face of the record, it was alleged, that a certain issue, duly joined between the parties, came on in due form of law to be tried, and was in due form of law tried; but, in fact, the plaintiff was nonsuited, and therefore there was no trial. — (Lord ELLEN-

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v.
COHEN.

(*a*) By the statute 8 and 9 *W.* 3. c. 11. s. 6. it is enacted, that "if there be two or more plaintiffs or defendants, and one or more of them die, if the cause of action survive to the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants, the writ or action shall not be thereby abated, but such death being suggested upon the record, the action shall proceed at the suit of the surviving plaintiff or plaintiffs against the surviving defendant or defendants."

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 v.
 COHEN.

BOROUGH. — This part of the objection, that the trial was not in due form of law, is the least tenable; the trial was in due form of law, since the forms of law were observed.) — The record goes on to state, that the defendant was examined on the part of *William Forman* and *William Thompson*, who was then dead, and it is alleged that he was called as a witness for *Thompson*, that the evidence was given with intent to injure the parties, one of whom was dead: in order to proceed further, a suggestion should have been entered according to the statute, and this not having been done, all the subsequent proceedings were extrajudicial: That the statute of *William* made the entry of a suggestion a condition precedent; if a writ of error had been brought in this case, the judgment would have been erroneous. Supposing this to have been the case of a sole plaintiff, would not his death have closed all the proceedings?

Gurney and *Taddy* for the prosecution. What might have been the case of a sole plaintiff, is not to be argued now. — (Lord ELLENBOROUGH. — But at law, the death of one is as fatal as the death of all, if not aided by the statute. The statute says “but if certain things be done,” and these have not been done; I am struck with the objection, which is a grave and difficult one.) — The general practice is not to suggest the death before the trial, and this affords a strong presumption as to the intention and meaning of the statute. The oath taken by the jury is to decide the issue, and that was
 joined

joined between the parties previous to the death. The second count is free from the variances which have been objected, since that count states, that the issue, before then joined between the parties, came on in due form of law to be tried, and that the defendant was then duly sworn to give evidence. (Lord ELLENBOROUGH. — The second count is well and cautiously introduced, and gets rid of all the objections, except that founded upon the necessity of a suggestion, under the statute.) — The want of a suggestion would be a ground for a writ of error in fact, but would not abate the suit altogether.

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v.

COHEN.

Lord ELLENBOROUGH. — I am of opinion that the suit is abated by the death of a co-plaintiff, unless a suggestion be entered; and if so, since the oath was taken in an unauthorized cause, I cannot say that the swearing amounts to perjury, however I may regret it. I look to the statute only, the other defects are cured by the second count. I have heard the arguments on both sides; and I am of opinion that the suit was abated at the time of the trial.

The defendant was accordingly acquitted.

Gurney and Taddy for the prosecution.

Topping and V. Lawes for the defendant.

1816.

REX v. COHEN and JACOB.

Same day.

The court will not grant a new trial after a defendant has been acquitted upon an indictment, although the acquittal was founded upon a misdirection by the judge.

THIS was an indictment against the defendants, for a conspiracy to defraud *Forman*, through the medium of the alleged perjury upon which the indictment in the last case was founded.

The first count stated the proceedings in the action upon the bill of exchange; that the issue came on to be tried in due form of law, and alleged a conspiracy between the present defendants, that *Cohen* should swear upon the trial that he saw the bill drawn and signed by *Bernard Jacob*, in *London*. There were also other counts, which charged a conspiracy to defraud the prosecutor more generally.

Gurney, in opening the case for the prosecution, admitted that the same objection might arise as upon the former indictment; but proposed to proceed, in order that the prosecutor might have an opportunity of moving for a new trial, and suggested that in a criminal case, a new trial might be granted in case of misdirection by the Court.

LORD ELLENBOROUGH. — I wish that you could bring the case before the Court; but I do not know any such distinction as that which has been suggested. The indictment here charges a conspiracy

spiracy to effectuate the former perjury, and I fear that the same result would take place.

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REX

v.

COHEN
and JACOB.

Upon this intimation the prisoners were acquitted. (a)

(a) See *R. v. Maubey* and Others, 6 T. R. 619. where Lord Kenyon says "In misdemeanors there is no authority to shew that we cannot grant a new trial in order that the guilt or innocence of those who have been *convicted* may be again examined into."

In *Michaelmas Term, 57 G. 3.* a motion was made for a new trial after a verdict for the defendants, upon an indictment for the non-repair of an highway, which had been tried at the preceding assizes at *Appleby, cor. Wood*, Baron.

Per Curiam. — The general rule is not to grant a new trial on an indictment where a verdict has been found for the defendant; and although it is possible that the rule might be relaxed in some cases where such rights would otherwise be compromised, in this case there is no such necessity, since a

new indictment may be found. And see *Rex v. Mann*, 4 Maule & Selwyn, 357. where the Court refused a new trial where a verdict had been found for the defendant, upon an indictment for a nuisance to an highway. See also *R. v. Reynell*, 6 East, 319. And in a penal action a new trial will not be granted on the ground that the verdict is against the evidence, *Brooks, q. t. v. Middleton*, 10 East, 268., *aliter*, where there has been a misdirection by the judge; (*semble*) *per Dampier, J.*, 4 Maule & Selwyn, 338. But in case of an indictment for a misdemeanor, where a doubtful question arises, the Court will in its discretion save the point for consideration, giving the defendant an opportunity in case he shall be convicted to move to have an acquittal entered. See *R. v. Gasb* and Another, *supra*.

1816.

REX v. ROPER.

Same day.

In an indictment for perjury it is alleged, that *Francis Cavendish Aberdeen*, and others, exhibited their bill in the *Exchequer*, &c. on the production of the bill, it purports to be the bill of *J. C. Aberdeen* and others, this is no variance, and it may be proved that this was the bill of *Francis Cavendish Aberdeen*. And there is no variance, although after this allegation, and after setting out such parts of the bill as are necessary, the words are added "as appears by the said bill, &c. filed of record."

THIS was an indictment against the defendant for perjury, alleged to have been committed in his answer to a bill of discovery, filed against him in the *Exchequer*, in order to discover whether he had not had notice of the loss of the ship *Vigilante*, of which he was a part-owner, previous to the effecting of policies of insurance upon that vessel and her cargo, to a very large amount.

The indictment alleged, (*inter alia*) That *Francis Cavendish Aberdeen*, *John Banister Hudson*, and several other underwriters, (whose names were specified) exhibited their bill of complaint, &c. to the Right Honourable *Spencer Perceval*, Sir *A. Macdonald*, Knight, and the rest of the Barons of His Majesty's Court of *Exchequer*, against *Robert Roper*, &c.; and after setting out such parts of the bill as were necessary, added *as appears by the said bill, &c. filed of record*.

Upon the production of the bill itself, the complainants on the face of the bill purported to be *J. C. Aberdeen*, *J. B. Hudson*, &c.

Knowlys for the defendant objected, that this was a fatal variance, since an allegation that *Francis Cavendish Aberdeen* exhibited a bill of complaint,

complaint, could not be satisfied by evidence that *J. C. Aberdeen* exhibited a bill; and if in fact *Francis Cavendish Aberdeen* exhibited his bill by the name of *J. C. Aberdeen*, there ought to have been an allegation to that effect in the indictment.

1816.

REX

v.

ROPER.

LORD ELLENBOROUGH. — The question is, whether *Francis Cavendish Aberdeen* did exhibit his bill as is alleged in the indictment. The usual mode of proving such an allegation is by the production of the bill in which the real name of the complainant truly appears; but it is competent to the prosecutor to prove, by other means, the allegation that *Francis Cavendish Aberdeen* did in fact exhibit his bill. — If the indictment had professed to set out the tenor of the bill, it would clearly have been a variance.

The indictment further alleged, that afterwards, to wit, on, &c., comes the said *Robert Roper*, in his own proper person, and exhibits and produces his answer to the aforesaid bill of complaint.

On the production of the answer it was entitled, “The answer of *Robert Roper* to the bill of complaint of *J. C. Aberdeen*, &c.”

Knowlys objected, that the answer produced, being thus entitled, was no proof of the allegation of an answer by the defendant to a bill of complaint by *Francis Cavendish Aberdeen*.

Garrow,

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REX

v.

ROPER.

Garrow, A. G., for the prosecution answered, that since it had been proved that the bill of complaint had in fact been exhibited by *Francis Cavendish Aberdeen*, and the other underwriters, it was not only proper, but necessary, to allege that the defendant exhibited his answer to the bill of *Francis Cavendish Aberdeen*.

Lord ELLENBOROUGH over-ruled the objection.

The defendant was found guilty.

Garrow, A. G., *Gurney*, and *Andrews* for the prosecution.

Knowlys and *V. Lawes* for the defendant.

In the ensuing term *Knowlys* moved for a rule to shew cause, why there should not be a new trial, on the ground that without an averment in the indictment that *Francis Cavendish Aberdeen* exhibited his bill by the name of *J. C. Aberdeen*, it was not competent to prove that he did so. This he contended, would be to admit evidence to contradict the record produced, and at all events there was a variance, since the indictment alleged that *Francis Cavendish Aberdeen* exhibited his bill, &c. as appears by the record, &c.; whereas that did not appear by the record, but had been proved by extrinsic evidence.

But

But the Court were of opinion, that the evidence to shew that *Francis Cavendish Aberdeen* did in fact exhibit the bill, was admissible, and that the words *as appears by the record, &c.* referred to the last antecedent, and could not be considered as incorporated with the prefatory allegation, that *Francis Cavendish Aberdeen* exhibited his bill.

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v.
ROPER.

A rule *nisi* was however granted upon another ground.

REX v. HUCKS.

Saturday,
Dec. 28th.

THIS was an indictment against the defendant for perjury.

In an indictment for perjury alleged to have been committed in the defendant's answer to a bill of discovery filed in the *Exchequer*, it is

The defendant was a part-owner of the ship *Vigilante*, and the perjury was assigned upon an answer by the defendant to a bill filed in the

alleged that the bill was filed on a day specified. The day is not material where it is not alleged as part of the record, and therefore there is no variance, although the bill, when produced, is found to be entitled generally of a preceding term.

The inspection of a record is within the peculiar province of the Court, and therefore if a doubt arise as to any word upon a record, the Court, and not the Jury, must resolve that doubt.

Whether a declaration made by a person *in articulo mortis* be receivable or not in evidence, is a question for the Court.

In an assignment of perjury it is alleged, that the defendant, at the time of effecting a policy of insurance purporting to have been under-written by A, B, C, and others, on a day specified well knew, &c. on producing the policy, it appears that A underwrote the policy on a different day, the defect is fatal, although it appears that B, C, &c., did underwrite the policy on that day.

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Exchequer, under the circumstances stated in the last case.

The indictment alleged that the bill was filed on the 1st day of *December*, in the year 1807 ; but on the production of the bill, it appeared to be entitled generally of the preceding *Michaelmas Term*, as is the practice where a bill is filed in the interval between two terms.

On the objection being taken that this was a variance —

Lord ELLENBOROUGH over-ruled it, saying that since the day was not alleged as part of the record, it was sufficient to prove the bill filed on any other day. (*a*)

A doubt occurred, whether a word in the record produced, which was written above an erasure, was *meeting* or *mutiny*.

Knowlys suggested, that this was a question for the jury.

Lord ELLENBOROUGH. — I think it is not a question for the jury, and it must not be so understood. The inspection of a record is within the peculiar province of the Court. — I am as jealous of the

(*a*) See *Rastal v. Stratton*, 1 H. B. 49. *Woodford v. Asbley*, 2 Campb. 193. and *Treatise on Criminal Pleadings*, 243. and the cases there cited.

rights of Juries as of those of the Court ; but certainly the inspection of a record does not belong to them. In this, as in many other cases, the question is exclusively for the consideration of the Court ; as for instance, where a declaration has been made by a party in *articulo mortis*, whether under all the surrounding circumstances the declaration is admissible in evidence. This point was considered by the Judges here, on a question proposed to them by the Judges in *Ireland*, who entertained doubts upon the subject, and this was their unanimous opinion. (b)

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The

(b) So whether a confession made by a prisoner, is admissible in evidence, or is to be excluded on account of any previous threat or promise, seems also to be a question exclusively for the consideration of the Court. — And it seems that all questions, as to the competency of witnesses and the admissibility of particular evidence, stand upon the same foundation. In the case of *Rex v. Woodcock*, Leach, 563. 3d ed. the prisoner was indicted for the wilful murder of his wife, it was impossible, from the time that the fatal wounds were inflicted, that she could live long, but although she retained her senses to the last moment, and repeated the circumstances of the ill usage she had received, she never expressed any apprehension, or seemed sensible of her approaching dissolution.

Lord C. B. *Byre*, under these circumstances, admitted the evidence, but left it to the Jury to

consider whether the deceased was not in fact under the apprehension of death, though she did not seem to expect immediate dissolution, and said, that if they were of opinion that she was, then the declarations were admissible. — But that if they were of a contrary opinion, they were inadmissible. — There was however in this case very strong evidence, independent of the declaration of the deceased ; but it is clearly inconsistent with principle to leave such evidence contingently to a jury to be acted upon or to be rejected according to their decision upon that which is clearly a matter of law. Whether the declaration of a person *in extremis* is receivable in evidence or not, depends upon the question, whether the awful situation in which the party stood did not render his declaration equally credible with a declaration made under the sanction of an oath, and therefore it might

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The assignments of perjury were alleged in this form : whereas in truth and in fact the said defendant, at the time of effecting the said policy, that is to say, a certain policy of insurance, purporting to have been underwritten by — *Kite*, by his agent *Meyer*, on the 13th of *August*, 1807, &c. (and by other underwriters specified in the indictment), well knew, &c.

On the production of the policy it appeared, that it had been underwritten by *Meyer* for *Kite* on the 15th of *August*.

Upon the objection that the allegation was material, and the variance fatal —

Garrow, A. G., and *Gurney* for the prosecution contended, that allowing the objection its greatest weight, the only effect was, that the single allegation of the subscription by *Meyer*, would remain disproved ; but that enough would still remain to support the indictment, which alleged the subscription of the policy by many other persons ; and that it was immaterial whether it was proved that all subscribed or not, and that it was sufficient to prove that some of those subscribed, who were alleged to have done so, — But

as well be left to a jury to say, or any other cause, from giving whether a witness ought to be evidence upon oath, as whether sworn, or whether he is not incapable of giving such evidence of a person *in extremis* ought to be received.

Lord

Lord ELLENBOROUGH was of opinion, that since they had chosen to allege a fact which was material with reference to the knowledge of the defendant, it was necessary to prove it, and that in consequence of the variance, the indictment was disproved.

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The prisoner was accordingly acquitted.

Garrow, A. G., Gurney, and Andrews for the prosecution.

Knowlys and V. Lawes for the defendant.

CAVAN and Another v. STEWART.

Monday,
December 30.

THIS was an action of assumpsit brought to recover a balance of 1441*l.* 3*s.* as money had and received by the defendant to the use of the plaintiffs, the defendant having paid into Court the sum of 1885*l.* 19*s.* 9*d.*

If a colonial court possess a seal, it must be used for the purpose of authenticating a judgment of the court, although it is so much worn as no longer to make any impression.

The plaintiffs were *West India* merchants, and established a *prima facie* case, by proving an admission on the part of the defendant of his having received on their account in the *West Indies* monies to the amount claimed.

A party here is not bound by a colonial judgment,

unless it appear either that he was summoned, or it be proved that he was once resident within the jurisdiction; and it is not sufficient that on the face of the proceedings he is described to be an absentee.

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The defence was, that this balance had been attached in the hands of the defendant by a judgment of the Supreme Court of Judicature in *Jamaica*, upon a process of foreign attachment, on account of a debt due from the plaintiffs to *Bogle*, *Hamilton*, and *Scott of Jamaica*.

It was proposed to prove the judgment in the following manner.

First, It was proposed to prove by a certificate signed by the Duke of *Manchester*, the governor of the island to which the great seal of the island was appended, that *William Buller* was secretary of the island, and notary public. Secondly, By a certificate under the hand of *William Buller*, as such notary public, that *F. Smith*, Esquire, who had signed and sealed the copy of the judgment annexed, was the clerk of the Supreme Court of Judicature in *Jamaica*. Thirdly, It was proposed to read a document which purported to be a true copy of a judgment obtained by *Bogle* and Others against *Stewart*, as the garnishee of the plaintiffs, in the sum of 2096*l.*; which also purported to have been signed and sealed by *Smith*.

The documents thus attested purported to be proceedings in the Grand Court of Judicature in the island of *Jamaica*. They recited that complaint had been made by *Bogle* and Others, that *James* and *Michael Cavan* of the island of *Barbadoes*, merchants, *absentees from the island* (of *Jamaica*),

Jamaica), were indebted to them in the sum of 5810*l.* and upwards ; and that the said *James* and *Michael Cavan* were then off that island ; and then commanded that the monies, goods, chattels, or debts of the said *James* and *Michael Cavan* should be attached in the hands of *William Stewart*, (the defendant,) or of those of any other person in whose hands the same might be found, and that the said *William Stewart*, and such other person, &c., should be summoned to shew cause why the said monies, &c. should not be delivered to the complainants on their giving security to return the same, or so much thereof as should afterwards be disproved. Then followed an entry of judgment by default ; and an assessment of the damages sustained by *Bogle* and Co., the complainants, and also of the attachable sum which *Stewart* as garnishee then had in his hands. The award of execution then followed, and the return, from which it appeared that the sum of 2096*l.* and upwards had been levied.

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It appeared that there was a seal belonging to the Supreme Court of Judicature in *Jamaica*, which was so much worn as to be incapable of making any impression ; but that it was still occasionally used for the purpose of sealing writs of execution, and for other purposes ; but that it had never been used for the attestation or exemplification of judgments.

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LORD ELLENBOROUGH. — Since it appears that there is a seal of the Court, it is necessary that the judgments of the Court should be authenticated under that seal, and a mere certificate without the seal is inadmissible. If the seal had been so worn as to be no longer capable of making an impression, another ought to have been procured; till then, as the seal of the Court, it ought to have been used; and it appears that it still is used upon some occasions. The question is, whether a mere certificate is sufficient to authenticate a judgment, where it appears that the Court has a seal which is still in occasional use. Great laxity has obtained of late with respect to these judgments; and I am of opinion, that the evidence now offered is insufficient.

Jervis, for the plaintiffs, objected also that it was incumbent on the defendant to prove that the plaintiffs had been summoned, or at least to shew that they had once been upon the island, for until that had been done, they could not be considered as absentees; and it seemed contrary to the plainest principles of justice that they should be bound by a proceeding to which they were from want of notice utter strangers. And he referred to the cases of *Fisher*, administratrix, v. *Lane* and Others, 3 *Wilson*, 297., where it was said by Chief Justice *De Grey*, that a custom not to summon or give notice to a defendant of a suit commenced against him was contrary to the first principles of justice; and that the twenty-seven colonies abroad
might

might make any law agreeable to the law of England and to the principles of justice, but that they could not make any contrary to the principles of justice. He also cited the case of *Buchanan v. Rucker*, 9 *East*, 192., in which it was held that an assumpsit could not be maintained on a judgment obtained by default in one of the colonies against a party, who on the face of the proceedings appeared only to have been summoned by nailing up a copy of the declaration on the door of the court-house of the colony; there being no evidence to shew that the defendant had ever been present in the colony.

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Garrow, A. G., and *Scarlett* for the defendant, contended that an actual summons was not necessary, where a party, having once been resident in the colony, had afterwards absented himself; and that in this case it was to be assumed that the plaintiffs were in that predicament, since on the face of the proceedings they were denominated *absentees*. They also attempted to distinguish this case from that of *Buchanan v. Rucker*, on the ground that the process here was against the goods only, and not against the person. And also because the complainants, *Bogle* and Co., had entered into a bond conditioned for the restoration of such of the monies, goods, &c. as should be disproved.

LORD ELLENBOROUGH. — It is perfectly clear on every principle of justice, that you must either

N N 3

prove

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prove that the party was summoned, or at least that he was once on the island. In the case before Lord *Mansfield*, it was in proof that the person leaving the island left an attorney in his place to act for him. If such a judgment could be enforced here without such proof, no merchant in London would be safe. The party must be proved to have been upon the island, in order to make him an absentee. If that fact had been established, his absence might perhaps have been inferred from a return of *non est inventus* to the process issued against him.

Verdict for the plaintiffs.

Jervis, Carr, and Puller, for the plaintiffs.

Garrow, A. G., and Scarlett for the defendant.

ADDENDA.

NICKSON v. THOMAS, 85.—But in a similar and subsequent case, Lord *Ellenborough* and the other Judges of the Court of K. B. upon a motion for a new trial, were of opinion that the objection did not absolutely disqualify the witness, but went to his credit only.

See *Wright* on the demise of *Clymer v. Littler*, 3 Burr. 1244.; *Jordaine v. Lashbrooke*, 7 T. R. 601.; *Lowe v. Jolliffe*, 1 Bl. 365.; *Rich v. Topping*, Peake's N. P. C. 224.; Esp. 177.

REX v. ROPER.—In the ensuing Easter Term, *Knowlys* moved for a rule to shew cause why the judgment should not be arrested on the following ground. It was averred in the indictment that *Francis Cavendish Aberdeen* and Others (whose names were specified) exhibited their bill of complaint, &c.

And the exhibiting of the answer was thus alleged, that the said *Robert Roper* in his own person exhibited and produced his answer in writing to the said *bill of complaint*, entitled the answer of *Robert Roper*, the defendant, to the bill of complaint of *J. C. Aberdeen* (and the other complainants). He contended, that since the answer alleged to have been put in was entitled an answer to the bill of complaint of *J. C. Aberdeen*, it could not be taken to be an answer to the bill of complaint of *Francis Cavendish Aberdeen*, without an averment that they were the same person. And that with respect to the bill alleged to have been exhibited, viz. the bill of *Francis Cavendish Aberdeen* and Others, the answer set out was wrongly entitled, and was to be considered as a *mere nullity*, and consequently that no perjury could be assigned upon it, and cited *Bevan v. Bevan*, 3 T. R. 601.

The Court granted a rule to shew cause, but the rule was afterwards discharged, the Court being of opinion that the answer put in, although improperly entitled, could not be treated as a mere nullity.

AN
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IN VOL. I.

ABATEMENT.

Assumpsit.—Plea in abatement, that *A.* and *B.* the assignees of *C.* a bankrupt ought to have been joined, it is not sufficient for the defendant to prove that *A.* and *B.* acted as assignees, he must prove that they were so either by the production of the assignment, or by proving the admission of the plaintiff to that effect. *Parmore v. Bousfield*, 296

A bill delivered by the plaintiff for business done for the *assured* (the defendant being one), but in which he debits the defendant with three-sevenths only of the whole amount, is *prima facie* evidence (the defendant having pleaded in abatement), that the action was brought to recover the defendant's particular share only. *ib.*

If persons separately interested in aliquot parts of a ship employ a joint agent, they are liable in the aggregate. *ib.*

See PERJURY, 4.

ABANDONMENT.

See INSURANCE, 9.

ACTION ON THE CASE.

1. A person before he entrusts a gun to an incautious agent is bound to render it perfectly innoxious. *Dixon v. Bell*, 287

In an action for wounding the plaintiff's son *per quod servitium amisit*, the plaintiff is entitled to recover the amount of the surgeon's bill although it has not been paid, but he cannot recover physicians' fees which have not been paid. *ib.*

2. In an action for negligently keeping a dog, proof that the defendant had warned a person to be ware of the dog lest he should be bitten, is evidence to go to a jury, of the allegation that the dog was accustomed to bite mankind. *Judge v. Cox*, 285

Qu. Whether such an allegation be necessary.

3. *A.* and *B.* are jointly interested in the profits of a common stage waggon, but by a private agreement between

between themselves each undertakes the conducting and management of the waggon, with his own driver and horses, for specified distances; they are notwithstanding this private agreement jointly responsible to third persons for the negligence of their drivers throughout the whole distance. *Waland v. Elkins*, 272

And an averment that the negligence was occasioned by the driver of *A.* against whom alone the action is brought, is supported (in such case) by proof that the driver was actually employed by *B.* in conducting the waggon, for his own stages. *ib.*

4. If the driver of a carriage upon a public road can adopt either of two courses, one of which is *safe* and the other *hazardous*, and he elects the latter, he is responsible for the mischief which ensues. — And he cannot, in such case, insist upon the fact that he kept to his own side of the road. *Mayhew v. Boyce*, 423
5. If through the default of a coach proprietor, in neglecting to provide proper means of conveyance, a passenger be placed in so perilous a situation as to render it prudent for him to leap from the coach, whereby his leg is broken, the proprietor will be responsible in damages, although the coach was not actually overturned. *Jones v. Boyce*, 498

See CARRIER, ASSUMPSIT, and DECEIPT.

ADMINISTRATOR.

1. As against creditors an administrator cannot be allowed for disbursements, in the schooling, feeding, or cloathing of the intestate's chil-

dren, subsequently to his decease.

Giles v. Dyson, 32

2. As against an administrator, debts due to the intestate are not to be considered as assets till actually received, although not stated in the administrator's inventory to be desperate. *ib.*
3. *Semble*, he is entitled for the reasonable charges of collecting the intestate's debts. *ib.*
4. After putting in an inventory, it is for the administrator to discharge himself of the items which it contains. *ib.*
5. *A.* who intermeddles with the affairs of *B.*, under the direction of *C.* (one of the executors of *B.* but who has declined to prove the will,) is chargeable as executor *de son tort*. *Cottle v. Aldrich*, 37
6. Although the probate of a will has been produced, the will itself cannot be read in evidence upon the mere production of it by the officer of the Ecclesiastical Court, without some indorsement upon it for the purpose of authentication. *Res v. Barnes*, 243

AGREEMENT.

1. In an agreement for the sale of leasehold premises to be paid for by instalments, it is stipulated that in default of payment of the instalments at specified times, the former instalments shall be forfeited, and the vendor shall not be compellable to convey.

The forfeiture enures to destroy every right which the vendee took under the agreement, but does not affect any right of possession which he had before. *Doe on demise of Moore v. Lawder*, 308

2. And no previous right being proved, (*semble*) the party after forfeiture is

- is a mere tenant by sufferance, and it is sufficient for the owner previous to an ejectment to enter upon the premises, indicating his intention to take possession without making any formal demand of possession. *ib.*
3. In an action for work and labour, proof that the plaintiff was in a state of intoxication when he signed that which is insisted upon by the defendant as an agreement, dispenses with the necessity of producing it. *Fenton v. Holloway*, 126
 4. An agreement for selling out omnium to be replaced in stock is not illegal. *Olsvierson v. Coles*, 496
 5. An agreement to employ the plaintiff in a particular situation cannot be inferred from a direction upon a letter addressed by the defendant to the plaintiff in that character, the letter itself relating to the quantum of salary only. *Chiodi v. Waters*, 335
 6. An agreement to procure a situation for a medical man, by the assignment of patients by a third person, to whom a premium is to be paid, is not illegal. *Edgar v. Blick*, 464
 7. The creditors of *A.* in consideration of his assignment of all his stock in trade and book debts to a trustee for the benefit of his creditors, agree to execute releases as soon as the property shall realize the sum of 238*l.* This agreement on the part of the creditors does not suspend their right of action against *A.*, although they have taken security from a purchaser of the stock in trade, for the sum of 223*l.* *Wigglesworth v. White*, 218
 8. The vendor of newly inclosed lands undertakes to convey them to the vendee, this is an undertaking to convey the legal estate; and the vendor having only an equitable interest previous to the assignment by the commissioners the vendee is entitled to recover his deposit. *Grane v. Baldwin*, 65
 9. Upon an agreement between two traders to supply each other on the footing of goods for goods, after a balance struck between them, such balance is to be paid in money. *Ingram v. Shirley*, 185
 10. An agreement to forego a criminal prosecution is illegal, but the plaintiff may recover on a bill given by the defendant for the costs of a civil proceeding against *B.* and the amount of a composition with *B.*, although the plaintiff has instituted a prosecution against *B.* which he afterwards abandons, unless it be expressly proved that the abandonment of the prosecution formed part of the consideration of the bill. *Harding v. Cooper*, 467

AMENDMENT.

1. The Court will not put off a trial upon motion at Nisi Prius, in order to enable the plaintiff to amend his declaration by omitting the *profert* of the bond on which the action is brought. *Paine v. Bustin*, 74
Nor will it allow the alteration to be made by way of amendment at Nisi Prius, for it is a matter of material allegation. *ib.*
2. In a *qui tam* action the Court will after verdict direct a *similiter* to be entered, although the objection founded upon the want of it was taken at the trial. *Wright qui tam v. Horton*, 400

ANNUITY DEED.

A trustee under an annuity deed executes the deed after the memorial has been enrolled, it is not necessary that

that a memorial of his subsequent execution should be enrolled. *See on demise of Delegal v. Holloway,* 431

APPLICATION OF PAYMENT.

See PAYMENT.

ASSUMPSIT.

1. A contract for a yearly service at a specific salary must be proved as alleged, although both the time and sum are averred under a *videlicet*. *Preston v. Butcher,* 3
2. Goods are supplied to a minor upon a fraudulent representation by his father, that he is about to relinquish his business in favour of the son, although the credit is given to the son, the father dealing with the proceeds, is responsible in assumpsit for goods sold and delivered. *Biddle v. Levy,* 20
3. *A.* being employed by *B.* as a clerk at a salary of 200*l.* per annum, payable quarterly, is discharged in the middle of a quarter and paid proportionally, *A.* is entitled to recover his salary for the remainder of the quarter on the general count for work and labour. *Gandall v. Pontigny,* 198
4. Work is to be done according to a special agreement between the parties, regulating the quantity, price, and times of payment. The parties having deviated from the original contract, and the original terms not being applicable to the new work, the plaintiff is entitled to recover, on the common count, for the latter, although the time for completing the payments under the original agreement had not expired when the action was commenced. *Robson v. Godfrey,* 275
5. After a special agreement between *A.* and *B.* for the purchase by *A.* of unfinished houses to be finished by *B.* at his own expence, it is agreed that *A.* shall finish them, and that *B.* shall repay to him the amount of the expences; *A.* cannot recover against *B.* for such expences on the common counts in *indebitatus assumpsit*. *Dunn v. Body,* 220
6. *A.* delivers to *B.* a quantity of cordage as the consideration for a special undertaking by *B.*, *A.* is not precluded by the special contract from recovering under the common counts for the excess of cordage delivered beyond the quantity stipulated for as the consideration, (provided that amount be adjusted,) although it may be necessary to give in evidence the terms of the special contract. *ib.*
7. *A.* having deposited with *B.* 100*l.* to distribute amongst *A.*'s creditors in proportion to their claims, no one of these can maintain an action against *B.* before the proportions of all the claimants have been ascertained. *Robson v. Andrade,* 372
A.'s declaration in such case is evidence to shew that *C.* is a creditor of his to a specific amount. *ib.*
8. It is no answer to an action on an attorney's bill for prosecuting a suit for the defendant, that no benefit has been derived by the defendant, where the failure does not result wholly from the plaintiff's negligence, but partly from accident. *Dax v. Ward,* 409
9. *A.* after committing an act of bankruptcy in order to procure his discharge from an arrest at the suit of *B.*, draws and indorses to *B.* a bill of exchange, which *C.* accepts in expectation of receiving goods of *A.*'s into his hands. *C.* receives the goods, sells them, and pays the amount

amount of the bill to *B.*, the assignees of *A.* cannot maintain an action against *B.* for this money as money had and received to their use.

Waller v. Drakeford, 481

10. *B.* agrees to purchase of *A.* a gun for the sum of forty-five guineas; but it is stipulated, that *A.* shall take a gun of *B.*'s, valued at thirty guineas, in part payment, *B.* having refused to deliver his gun and complete the contract, *A.* is entitled to recover the sum of forty-five guineas as the stipulated price. *Ferryth v. Jervis*, 437

11. In an action of assumpsit it is alleged as a breach, that certain goods sold and delivered to the plaintiff, and warranted to be scarlet cuttings, were not scarlet cuttings, *per quod*, they became and were of no use or value to the plaintiff. The plaintiff is entitled, without any further allegation of special damage, to recover as much as the goods would have been worth to him had the contract been faithfully performed by the defendant. *Bridge v. Wain*, 504

ATTESTING WITNESS.

1. An attesting witness to a bond resides in Ireland, (*semble*) his handwriting may be proved, although no steps have been taken to procure his personal attendance. *Hodnett v. Forman*, 90
2. An indorsement upon a promissory note, purports to have been attested by a subscribing witness, the witness must be called to prove such indorsement. *Stone v. Metcalf*, 58
3. In proving the execution of a bond, it is not necessary that the attesting witness should be able to state that the blanks were filled up at the time of execution. *England v. Roper*, 304

ATTORNEY.

1. Previous to the bringing an action on an attorney's bill, it is sufficient under the st. 2 G. 2. c. 23. s. 23. to deliver a bill at the defendant's last known apparent place of abode at the time when the bill was delivered.

And it is not sufficient for the defendant to shew that he had another known place of abode, subsequent to the delivery of the bill.

Wadson v. Smith, 324

2. An action may be maintained by a solicitor against an assignee for business done under a commission of bankruptcy, although the bill has not been taxed by a master in chancery, under the st. 5 G. 2. c. 30. s. 45. *Tarn v. Heys*, 278
See *Arrowsmith v. Barford*, 279 in note.

3. A bill with an indorsement upon it, "March 4, 1815, delivered a copy to *C D.*," which indorsement is proved to be in the hand-writing of a deceased clerk of the plaintiff's, (whose duty it was to have delivered a copy of the bill,) and proved to have existed at the time of the date, is evidence to prove the delivery of the bill. *Champneys v. Peck*, 404

AWARD.

1. *Qu.* Whether an award directing the assignment of an interest to *A. B.* will warrant an assignment to *A. B.* his executors administrators and assigns. *Russel v. Headington*, 13
2. It is within the scope of the jurisdiction of an arbitrator, to whom all matters in difference are referred, to direct one of the parties, who has acted as agent for the other, in supplying provisions to the British army, to go before the commissary to

to verify particular documents.
Atkins v. Baldwin, 209

BAIL.

If a party who is bail to the sheriff apply to an attorney to put in bail above, he is liable for these expences, but not for the subsequent expences of the suit. *Prima facie* the expences of the suit are due from the principal, and the charges of the bail for putting in bail above from the bail. *Hedder v. Carpenter*, 190

BANKER.

See BILL OF EXCHANGE, 1.

BANKRUPTCY.

1. A petitioning creditor is a competent witness to defeat the commission, and even to cut down the petitioning creditor's debt. *Loyd v. Stretton*, 40
2. A defendant in an action by the assignees of a bankrupt pleads the General Issue, without giving notice of his intention to dispute the bankruptcy, but before the time for pleading expires, delivers the General Issue again with notice, such notice is insufficient. *Poole v. Bell and Another*, 328
3. The defendant in such a case ought to move for leave to withdraw his plea. *ib.*
4. In an action by the assignees of a bankrupt, where no notice has been given to dispute the bankruptcy, a deposition, stating that the bankrupt absented himself, and that the bankrupt had admitted that he absented himself for the purpose of avoiding his creditors, but not specifying the time of such admission, is not *prima facie* evidence to prove the act of bankruptcy. *Marsh v. Meager*, 353
5. A bankrupt having obtained his certificate is not liable upon a promise to pay a former debt, unless it be express, distinct, and unequivocal. *Fleming v. Hayne*, 370
6. Where no notice has been given of disputing the bankruptcy in an action by the assignees, it ought to appear from the depositions that the petitioning creditor's debt was due at the time of the act of bankruptcy. *Lawson v. Robinson*, 456
7. If in an action by the assignees of a bankrupt it be proved that an act of bankruptcy was committed before the commission issued, it will be sufficient, although the act was committed so recently before the commission, and at such a distance from London, that no knowledge of it could have reached London at the time when the commission was sued out. *Hopper and Others v. Mowbray*, 507
8. A creditor who along with others has become a party to a deed of trust, by which in consideration of the assignment of certain debts due to their debtor for their benefit they release their debts, is not precluded from suing out a commission of bankrupt against the debtor on its being discovered that he had previous to the execution of the deed committed a secret act of bankruptcy. *Doe d. Pücher v. Anderson*, 262
9. A. takes B.'s goods in execution after an act of bankruptcy committed by B., and assigns them to C. A.'s examination taken under the commission subsequently to the assignment, cannot be read in an action by the assignees against C. in order to shew A.'s knowledge of B.'s insolvency at the time of the execution. *Deady v. Harrison*, 60
But (*semble*) an examination taken previously

- previously to the assignment, would have been admissible. *ib.*
- In such a case the question is not whether *C.* knew, but whether *A.* knew that *B.* was insolvent. *ib.*
10. A bill delivered by the defendant to two partners for the purpose of being discounted, after the bankruptcy of one is indorsed over by the other partner to the plaintiffs, to whom they are largely indebted for advances. *Qu.* Whether the plaintiffs under these circumstances are entitled to recover. *Ramsbotham v. Cator*, 228
11. *A.* at the instigation of *B.* procures credit for goods to a large amount, which he sells to *B.* at very inadequate prices, in fraud of his creditors, the assignees of *A.* after his bankruptcy, cannot recover the difference from *B.* *Hogg v. Mitchell*, 241
12. In an indictment against a bankrupt, the petitioning creditor's debt is alleged to be due to *A.*, *B.*, and *C.*, surviving executors of the last will and testament of *D.*, after proof that *A.*, *B.*, and *C.* were the executors, and were directed by the will to carry on the business, it is necessary to prove that they all assented to act in discharge of the trust. — And a general admission by the prisoner of a debt due to the executors of *D.* will not supply the defect. *Ren v. Barnes*, 243
13. Debt on bond by the plaintiffs as the assignees of a bankrupt, plea payment it is not incumbent on the plaintiffs to prove themselves to be assignees. *Crosbie v. Oliver*, 76
14. The date upon a promissory note made by a bankrupt, is *prima facie* evidence to shew that the note existed before the act of bankruptcy was committed, so as to establish a petitioning creditor's debt in an action by the assignees. — But no declaration by the bankrupt, whether oral or written, subsequent to his bankruptcy, would be admissible in evidence to prove this. *Taylor v. Kinloch*, 175
15. The mere deposit of the documents relating to a vessel at sea, in the hands of a *bond fide* creditor, will not confer even an equitable lien upon the creditor, against the assignees of the owner under a subsequent commission. *ib.*
16. It is competent to a defendant to impeach the title of a bankrupt in an action by the assignees, although he himself claims the title under the bankrupt. *ib.*
17. A transfer of property made on the eve of bankruptcy, but under the apprehension that a degree of force, civil or criminal, is about to be applied, is valid.
- A transfer by one of two partners on the eve of bankruptcy, under circumstances which overcome the free will of the party, such as the apprehension of a prosecution for forgery, is valid. *De Tastet v. Carrol*, 88
18. *A.* shortly before his bankruptcy draws a bill, and having procured it to be discounted, gives *B.* a creditor an order to receive the amount which he directs *C.* who discounts the bill to transmit to *B.*; whilst the money is in the hands of the carrier, *A.* commits an act of bankruptcy, *B.* who afterwards receives the money, is liable to *A.*'s assignees. *Hervey v. Liddiard*, 123
19. *Qu.* Whether in an action by the assignees of a bankrupt, the petitioning creditor is compellable in a court of law to produce the bill of exchange drawn and indorsed by the bankrupt, on which the petitioning creditor's debt is founded. *Reed v. James*, 132

20. A petitioning creditor called for the mere purpose of producing such a document, cannot, although he has been sworn, be cross-examined by the defendant. *ib.*
21. It is competent to the assignees of a bankrupt upon the trial, to repudiate an insufficient act on which the commission is founded, and resort to better. *Reed v. James*, 136
22. The assignees of a bankrupt may recover as for money had and received against the defendant who took the goods of the bankrupt in execution, (after an act of bankruptcy,) and then took the goods under a bill of sale from the sheriff, although no money was actually paid. *Reed v. James*, 134
23. A bankrupt in an action by the assignees against a judgment creditor who has taken the goods of the bankrupt in execution, is competent to prove that the creditor knew that the bankrupt was insolvent at the time of the execution. *ib.*
24. One of three partners undertakes to provide for two bills of exchange drawn by the three partners, and accepted by a fourth person, when they shall become due, such acceptances will not support a commission of bankrupts, on the petition of the three partners against the acceptor.
- Although the conduct of the partner may as against his copartners have been fraudulent. *Richmond v. Heapy*, 202
25. A debtor of a bankrupt is not warranted in paying funds of the bankrupts to a creditor (who sues the bankrupt in the mayor's court) upon an attachment issued against him as garnishee.
26. It is no objection to the petitioning creditors' debt, that the petitioning creditors were in partnership with the bankrupt in a particular transaction, provided the debt does not arise out of that transaction. *Windham v. Paterson*, 144
27. If a trader leave the realm for the purposes of trade, but whilst he is absent, announce his intention never to revisit *England*, he commits an act of bankruptcy by absenting himself. *ib.*

BARRATRY.

Improper treatment of the vessel by the captain will not constitute barratry, although it tend to the destruction of the vessel, unless it be shewn that he acted against his own judgment. *Todd v. Ritchie*, 240

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. When a banker's acceptances exceed the cash balance in his hands, he holds collateral securities for value. *Bosanquet v. Dudman*, 1
2. And he may recover against the acceptor of an accommodation bill (deposited with him as a collateral security before it became due), although the party who deposited the bill had it in his hands when it became due, and has received satisfaction from the drawer. *ib.*
3. An agreement between the holder and the acceptor of a bill (dishonoured for non-payment), that the acceptor shall pay to the holder the amount of the bill, and no more, discharges the drawer, although his assignees (he being then a bankrupt) are parties to such agreement. *De la Torre v. Barclay*, 7
4. *A.* deposits with *B.* a banker, a promissory note as a security for advances, *B.* is entitled to recover on the note, although before it became

- came due, he parted with the possession to enable *A.* to procure payment from the maker, and although the note remained in *A.*'s hands till his bankruptcy, and then came into the possession of his assignees. *Bruce v. Hurly*, 23
5. *A.* the holder of a bill deposits it with *B.* as a collateral security for the balance of accounts between them; *B.* indorses the bill over to *C.* after it becomes due. In an action by *C.* against *A.*, *B.*'s account-book is not evidence in diminution of the balance between *A.* and *B.* — But *semble* a contemporaneous entry or declaration by *B.* would be admissible. *Collenridge v. Farquharson*, 259
6. And (*semble*) *C.* is not entitled to recover from *A.* a sum exceeding the lowest amount of the balance, subsequent to the transfer to *B.* *ib.*
7. A defendant who has given his promissory note, as the stipulated price of a picture, cannot give the inadequacy of the consideration in evidence, with a view to diminish the damages, but he may give it in evidence as a circumstance indicative of fraud, in order to defeat the contract altogether. *Solomon v. Turner*, 51
8. *A.* being indebted to *B.* draws a bill of exchange upon *C.* payable to *B.* two months after date, and upon presentment of the bill by *B.* to *C.* for acceptance the date is altered at the instance of *C.* without any communication with *A.*, *B.* cannot recover against *C.* on his acceptance for want of a new stamp. *Walton v. Hastings*, 215
- And *semble* if *A.* had assented to the alteration, a new stamp would still have been necessary.
9. Where a bill of exchange is payable a specified number of days after sight, the real day of presentment for acceptance need not be alleged, a presentment on a day subsequent to that alleged may be proved. *Forman v. Jacob*, 46
10. And in such case a subsequent allegation of presentment for payment when the bill became due and payable, is supported by proof of a presentment on the day when the bill in fact became due, according to the previous presentment, *ib.*
11. The maker of a promissory note, whose signature has been proved in an action by the payee, cannot insist upon indorsements being read, which are not a part of the note. *Stone v. Metcalf*, 58
12. An agreement indorsed on a note, by which the plaintiff, the payee, undertakes to enlarge the time for payment specified in the body of the note, cannot be considered as incorporated with the note so as to render an agreement-stamp necessary. *ib.*
13. The payee of a note indorses upon it, my will and desire is, that the money shall not be called in for two years, &c. and that if the said *C. S.* shall wish for further time, he shall have it without suit at law until three years next after my decease; *semble*, these are words of mere indulgence and favour, and do not operate as a defeasance. *ib.*
- Qu.* What their effect would be as between the maker of the note and the *executors* of the payee? *ib.*
14. A foreign bill is accepted for the payment of 100*l.* sterling, the omission of the word sterling in the declaration is not a material variance. *Glossop v. Jacob*, 69
- Where a foreign bill is payable at a certain time after sight, and upon the production of the bill, an acceptance appears to have been written by the defendant under a

- date which is not in his hand-writing, the date is evidence of the time of acceptance, because it is the usual course of business in such cases, for a clerk to write the date, and for the party to write his acceptance under the date. 69
15. An indorsee for value transfers the bill which is returned to him after it has become due, he may recover against the acceptor, although his indorsee before the retransfer received satisfaction from the drawer. *Buzard v. Flecknoe*, 334
16. *A.* draws a bill of exchange upon *B.*, payable at three months, for a debt due from *B.* to *A.* On the delivery of the bill to *B.* for acceptance, *B.* requests that *four months* may be substituted for *three*, and afterwards by the assent of *A.* the alteration is made, a new stamp is not requisite. *Kennerly v. Nash*, 452
- A bill is drawn for the sum of 100*l.* payable four months after date, bearing interest. The interest is to be calculated from the date of the bill. *ib.*
17. The payee of a bill of exchange indorses it upon an usurious contract at the time of the contract, a *bonâ fide* holder cannot afterwards recover upon it against the acceptor. *Lowes v. Mazzaredo*, 385
18. Notice having been given in an action on a bill of exchange that the want of consideration will be set up as a defence, it is not competent to the plaintiff, after he has closed his case, to go into evidence of consideration in reply to the defendant's case.
- A.* being a creditor of *B.*'s, and having deeds in his possession as a security for the debt, receives a bill indorsed by *B.* for the purpose of getting it discounted, he cannot disappropriate the bill, and maintain an action upon it against the acceptor. *Delauney v. Mitchell*, 439
19. Two plaintiffs who sue as the indorsees of a bill of exchange indorsed in blank, are not bound to prove any partnership. *Rordarnz v. Leach*, 446
20. The statute 15 G. 2. c. 13. s. 5. does not preclude the members of a commercial firm, although exceeding six in number, from drawing bills at a shorter date than six months. *Wigan v. Fowler and Others*, 459
21. The whole of a promissory note being printed, except the names, dates and sum, and a place of payment inserted at the bottom of the note being also printed, a special presentment there is necessary. *Trecothick v. Edwin*, 468
22. Presentment of a bill of exchange at a merchant's counting-house, where it is payable between six and seven in the evening, is sufficient. *Morgan v. Davison*, 114
23. In an action by the indorsee against an indorser of a bill of exchange, a witness states that either two or three days after the dishonour of the bill, notice was given by letter to the defendant, (notice in two days being in time, but notice on the third too late,) it cannot be left as a question for the jury, whether notice was given in time, although the defendant has had notice to produce the letter which would ascertain the time. *Lawson v. Sherwood*, 314
24. Proof of a promissory note payable to *A. B.* generally is *prima facie* evidence of a promise to *A. B.* the father, and not to *A. B.* the son, the names being the same, but *A. B.* the son, although styled in the declaration *A. B.* the younger, bringing the action, and being in possession

- session of the note, is entitled to recover upon it. *Sweeting v. Fowler*, 106
25. *A.* accepts a bill in favour of *B.*, payable at his bankers; the bill is never presented; eight months after the bill becomes due, *A.*'s bankers having funds of his in their hands become bankrupts, *A.* is not discharged by *B.*'s laches.
- A request by *A.* subsequent to the bankruptcy, that *B.* will return the acceptance, is no waiver of the laches. *Sebag v. Abubol*, 79
26. The maker of a promissory note, payable at a specified time after sight, at the time of making it writes in the margin, "accepted by myself," these words constitute no part of the original instrument, and need not be noticed in the declaration. *Spligerber v. Kohn*, 125
27. The drawer of a bill of exchange, who before the bill becomes due, says my residence is immaterial, I will inquire whether the bill is paid, dispenses with notice of the dishonour. *Phipson v. Kneller*, 116
28. A copy of a letter containing notice of the dishonour of a bill is admissible without notice to produce the original. *Roberts v. Bradshaw*, 28
29. Proof that duplicate notices of the dishonour of a bill were written, and that a letter was delivered to the defendant, upon the dishonour of a bill, together with proof of notice to produce the letter so delivered, as containing notice of dishonour, is evidence (on default of production) that the defendant had notice. *ib.*
30. Notice to the drawer of a bill of exchange of its dishonour by any party to the bill, enure to the benefit of all. *Wilson v. Swabey*, 34
31. The plaintiff having guaranteed the responsibility of the defendant to *A.* the latter refuses to join in a deed of composition, releasing the defendant, till the plaintiff has undertaken to pay him the full amount of his debt, the plaintiff having paid to *A.* the difference between the composition and his debt, draws a bill on the defendant, (which the latter accepts) in order to reimburse himself. The plaintiff cannot recover on this bill against the defendant. *Bryant v. Christie*, 329
32. A letter written by the indorser of a bill of exchange, to a subsequent holder, offering to give a substituted bill in place of that which he had indorsed, supersedes the necessity of proving the intermediate indorsements stated in the declaration. *Sidford v. Chambers*, 326
33. A presentment of a bill at a banker's where it is payable is sufficient, although made after banking hours, provided a person be stationed by the banker to return an answer. *Garnett v. Woodcock*, 475
34. A bill is drawn payable in *London*, and is accepted payable at a particular banker's in *London* (*semble*) a presentment at that banker's must be proved in an action against the acceptor. *ib.*
35. *A.* and Co. bankers in the country being pressed by *B.* and Co. bankers in town, to whom they are indebted, to send up any bills that they can procure, transmit for account an accommodation bill accepted by *D.*; when the bill becomes due, the balance is in favour of *A.* and Co. but the bills are not withdrawn, and afterwards the balance between the houses turns considerably in favour of *B.* and Co. and is so when *A.* and Co. become bankrupts: *B.* and Co. are entitled to recover against the acceptor. *Atwood v. Crowdis*, 483

36. Evidence of a letter from the drawer and indorser of an accommodation bill, that the bill will be satisfied before the next term, supersedes the necessity of proving the dishonour of the bill and notice. *Wood v. Brown*, 217
37. A bill of exchange is, by the direction of the payee, indorsed in blank, and delivered to A., B., and Co. who are bankers, on the account of the estate of an insolvent, which is vested in trustees for the benefit of his creditors. A. and B., two of the members of the firm, and also trustees, cannot, conjointly with a third trustee, who is not a member of the firm, maintain an action against the indorser, without some evidence of the transfer of the bill to them as trustees by the firm, by delivery or otherwise. *Machell v. Kinnear*, 499

BROKER.

1. A payment by the vendee of goods to the broker is good, if the name of the principal be not disclosed, although the vendee knows that the broker sells for some unknown principal. *Campbell v. Hassel*, 233
And it makes no difference in such case, whether or not the broker acts under a *del credere* commission.
2. But a payment in such case would not be good, if it varied from the original terms of the contract. And evidence of a custom to that effect is not admissible. *ib.*
3. And the terms being a bill at four months, two and a half discount for ready money, prompt in fourteen days, a payment by bill at two months, deducting one and a half discount, is no payment as against the principal, although he makes no demand till after the expiration of the time of credit. *ib.*
4. By the custom of the *Irish* pro-

vision trade, the authority of the broker to sell the goods of his principal, (in the absence of special authority to the contrary,) expires with the day on which it is given.

Dickenson v. Lilwall, 128

Qu. Whether the bought and sold notes made by a broker are not sufficient to satisfy the Statute of Frauds, although he makes no entry in his book. *ib.*

5. It is to be presumed that a broker who has bought goods for his principal has done every thing requisite, according to the usual course of dealing for the completion of the purchase. *Boville v. Bradbury*, 136

CARRIER.

1. In an action against a carrier for negligence, the defendant cannot read in evidence, an advertisement in a newspaper, by which he limits his responsibility, unless he first prove that the plaintiff was in the habit of reading that paper. — But (*semble*) an advertisement in the *Gazette* may be read without such preparatory proof, but without it, the evidence is weak. *Leeson v. Holt*, 186
2. The captain of a vessel who carries the goods of another, though not for hire, is bound to take prudent care of them. And if he intermeddle with the chest of a seaman, who has been casually left behind, he is bound to restore it to its former state of security, particularly if the contents be valuable. *Nelson v. Macintosh*, 237

CERTIFICATE.

See BANKRUPT.

CHARTER-PARTY.

Under a covenant in a charter-party that the ship shall be provided with every thing needful and neces-

necessary for the voyage, the owner is bound to provide the proper documents as well as necessities for the ship itself.

And is therefore bound to provide a bill of health, if it be essential to the performance of the voyage, within a reasonable time, within the intention of the parties. *Levy v. Costerton*, 212

COACH-OWNER.

See ACTION ON THE CASE.

COMPETENCY.

1. In an action against the owner of a ship, for the negligence of his pilot, who was employed both by the owner and by the captain, the pilot is a competent witness for the defendant, though he has been released by him alone, and not by the captain. *Aldrich v. Simmons*, 214
2. *A.* whose name has been registered as the part-owner of a vessel on the oath of *B.*, and has afterwards conveyed such share by deed to *B.*, covenanting for the goodness of his title, cannot be admitted to prove by the evidence of *B.* that he had in fact no interest in the vessel. *Nickson v. Thomas*, 85
But see the *Addenda*.
3. The joint acceptor of a bill of exchange is not competent to prove a set-off in an action by the holder against the drawer. *Mainwaring v. Mytton*, 83

See EVIDENCE.

COPYHOLD.

An attorney may be appointed, for the purpose of suffering a recovery of copyhold lands, as of common right, unless there be an express custom to the contrary. *Wymer v. Page*, 9

COSTS.

Trespass, the breaking of a jar is sufficient to entitle the plaintiff to full costs under a count, alleging an *asportation and conversion*. *Gosson v. Graham*, 55

COVENANT.

In an action of covenant, it is no objection under the plea of *non est factum*, that the deed contains material qualifications of the covenants set out, which qualifications are not noticed in the declaration. *Gordon v. Gordon*, 294

DEATH.

Where a vessel is proved to have sailed, and has not been heard of for two or three years, it is to be presumed that she is lost, but at what time an individual who sailed on board of such vessel perished, is to be collected by the jury from the particular circumstances of the case. *Watson v. King*, 121

DECEIT.

In an action against a vendor for a deceitful representation, the plaintiff must prove that deceit was used by the defendant for the purpose of throwing the plaintiff off his guard, and preventing him from being watchful. *Dawes v. King*, 75

DEED.

1. The premises intended to be conveyed by a deed of mortgage, are described as the defendant's undivided moiety, &c., the deed afterwards professes to convey *all* the defendant's estate, &c. in the premises. This conveys the moiety only to which the defendant was entitled in his own right, and not

o o 3 one

- one third part of the same premises in which he was interested as a co-trustee with the lessors of the plaintiff. *Doe d. Raikes v. Anderson*, 155
2. An indorsement on a deed after it has been signed by the parties, but written at the same time with the sealing and delivery, is part of the deed. *Lyburn v. Warrington*, 162

DEMURRAGE.

The plaintiff having conveyed *French* wines from *Oporto* to *England* for the defendant, it is incumbent on the defendant to procure an order for their landing from the lords of the treasury, and the plaintiff is entitled to recover for demurrage, during the delay necessary for the obtaining such order. *Hill v. Idle*, 111

DISTRESS.

An appraisement of a distress by the person who makes it is irregular. *Westwood v. Cowne*, 172

DOG.

See ACTION ON THE CASE.

EJECTMENT.

1. A title having been proved in *A.* who continues in possession from 1809 to 1814, and from whom the lessor of the plaintiff in ejectment derives title in 1815, it is not sufficient for the defendant to prove a bare possession by himself during the year 1814. *Doe d. Pücher v. Anderson*, 262
 2. *A.* who claims to hold lands under *B.* as a security for a debt, cannot defend an ejectment against the assignees of *B.* after his bankruptcy, on the ground that the grant under which *B.* derives his title from the crown is void. *Doe d. Biddle v. Abrabams*, 305
 3. In ejectment on a clause of re-entry in case the tenant should assign, set over, or otherwise let the demised premises, it is not sufficient to prove the defendant a stranger in possession of the demised premises, and his declaration that they were demised to him by another stranger. *Doe v. Payne*, 86
- And such evidence would not be sufficient, even if the tenant had covenanted not to part with the possession. *ib.*

ENCROACHMENT.

See INCLOSURE.

EVIDENCE.

1. The examination of a prisoner before the magistrate previous to his committal, purports to have been taken on oath. Evidence upon the trial of the prisoner for felony is not admissible, to shew that in fact the examination was not on oath. *Reg v. Smith and Hornage*, 242
2. In an action against the owner of a chartered vessel for negligence, in consequence of which the plaintiff's goods were lost, the non-arrival of the vessel at her destined port is not even *prima facie* evidence of negligence. *Boyson v. Wilson*, 236
3. The counterpart of a lease purporting to have been executed by a lessee of a lease granted by the mortgagor, in conjunction with the mortgagee of certain premises, cannot be read in evidence as against one who derives title under the mortgagee, without some evidence of the execution of the original lease (which has been lost) by the mortgagee.

But

- But proof that the original lease was signed by the mortgagee, the subscribing witnesses not being known, would be sufficient to warrant the reading of the counter-part. *Doe d. Clark v. Trapaud*, 281
4. Before a document can be read as a record, it must be proved either that it came out of the hands of the officer of the court, or from the proper place of depositing the records of the court of which it professes to be a record, and the contents of the document itself cannot be called in aid in support of such proof. *Adamthwaite v. Synges*, 183
5. After notice to produce a letter written by the plaintiff to the defendant, parol evidence of its contents may be given by any one who recollects the contents, although it is in the plaintiff's power to produce the clerk who wrote the letter. *Liebman v. Pooley*, 167
- But in such case the contents cannot be proved by the production of a copy of the original copy. *ib.*
6. At the time of hiring a horse a note of the agreement is made, stating the time and the price, the plaintiff is not precluded from proving by parol evidence additional terms of agreement. *Jeffery v. Walton*, 267
7. In an action on a policy on goods, the bill of lading signed by the captain is not evidence to prove the plaintiff's interest in the goods. *Dickson v. Lodge*, 226
- An allegation that the policy has been effected for the plaintiffs by *A.*, *B.*, and *C.* is satisfied by proof that it was effected by the firm *A.* and *B.* there being in fact two firms which have two members in common. *ib.*
8. A solicitor to a third person is bound to produce his client's lease, executed by the defendant, provided the production will not operate to the prejudice of his client. *Copeland v. Watts*, 95
9. But if the reading of such a document would operate to the prejudice of a third person, the Court will not direct it to be read. *ib.*
10. Evidence that the lord of a manor has from time to time erected houses to the exclusion of those claiming a right of common, is not to be placed in competition with evidence of long enjoyment, coupled with an acknowledgment of the defendant, the lord of the manor by deed, that the confirmation of the commoners was essential to an alienation of part of such common. *Drury v. Moore*, 102
11. Proof that the plaintiff wrote a letter to the defendant, purporting to contain a bill of exchange, with directions how the product should be applied, and that the defendant soon afterwards had a bill in his possession, which answered the description contained in the letter, affords presumptive evidence, that both the letter and the bill found their way to the defendant. *Kieran v. Johnson*, 109
12. In order to make the assignees of a bankrupt liable for money had and received by the bankrupt for a specific purpose, it is necessary to prove that the money came into their hands, with a knowledge of the purposes for which it was destined. *ib.*
13. In an action for a penalty against the master of a coal vessel, for the delivery of a ticket before the arrival of the vessel, the copy of the certificate delivered to the clerk of the market, describing the defendant as master of the vessel, is not sufficient

- sufficient evidence to prove a sending by the defendant. *Allred v. Halliwell*, 117
14. But (*semble*) a sending by him would be presumed on further proof, that he was master of the vessel. *ib.*
15. Policies of insurance having been delivered to the assignees of a bankrupt, one of whom is since dead, proof of an application to the solicitor under the commission for such policies who did not know what had become of them, does not warrant the admission of secondary evidence. *Williams v. Youngusband*, 139
- In an action for effecting policies of insurance, it is necessary to prove their existence by producing them. *ib.*
16. *A.* undertakes to act as the agent of *B.* in recovering the amount of an insured cargo, subject to the superior claim of *C.* who resides abroad. In an action by *B.* against *A.* to recover his proportional share of the amount recovered by *B.*, an invoice sent by *C.* but to which *A.* is not privy, is not admissible in evidence against *A.* in order to shew the extent of *B.*'s interest. *Mendham v. Thompson*, 316
17. By the contract between the owners and captain of an *India* ship, the latter is to receive a certain compensation in lieu of *privilege* and *primage*; a conversation between the parties previous to the contract is evidence to shew in what sense they intended to use the word *privilege*. *Birch v. Depeyster*, 210
18. A shipping entry at the custom-house, although to some purposes a public document, is not evidence to affect the person (whose duty it was to cause the entry to be made) criminally, the materials from which the entry was made, by the proper officer, having been accidentally destroyed. *Hughes v. Wilson*, 179
19. The question being whether a piece of cloth has been returned by the defendant to the plaintiff, the production of a note by the defendant, in which the plaintiff requests him to return the piece by the bearer, is *prima facie* evidence to shew that the piece has been returned.
- And the plaintiff ought to call the bearer of the note to shew that the piece has not been returned through him. *Shepherd v. Currie*, 454
20. In an action of replevin, between the assignees of a bankrupt (who was formerly tenant to *A.*) and the bailiff who distrained, one issue is, whether the assignees are tenants to *A.* A verdict against the assignees on this issue, is afterwards conclusive as to the tenancy of the assignees in an action brought by *A.* for rent. *Hancock v. Welch*, 347
21. A loan of money by *A.* to *B.* is not to be inferred from the bare fact that *A.* delivered a sum of money to *B.* which *A.* had borrowed from another. *Welch v. Seaborn*, 474
22. Where there is a competition of evidence upon the question whether a security has been satisfied by payment, the possession of that security by the claimant ought to turn the scale. *Brembridge v. Osborne*, 374
23. The assignees under a commission of bankrupt may maintain an action on a promissory note given as a collateral security for goods sold by them to one of the bankrupts. *Rawson v. Walker*, 361
- The defendants undertaking by such note to pay *on demand*, cannot adduce

adduce evidence to shew a liability on a contingency only, 361

24. The inspection of a record is within the peculiar province of the Court, and therefore if a doubt arise as to any word upon a record, the Court, and not the Jury, must resolve that doubt. *Rex v. Hucks*, 521

25. Whether a declaration made by a person *in articulo mortis* be receivable or not in evidence, is a question for the Court. *ib.*

26. In an action on a covenant by the defendant to pay the amount of all bills drawn by him and accepted by the plaintiff, it is sufficient for the latter to produce the bills drawn by the defendant without going on to prove payment of such bills. *Gibson v. Featherstonhaugh*, 225

27. *A.* brings an action against *B.* for the price of a gun ordered by the latter, he may read in evidence, for a collateral purpose, part of a letter written by *B.* to him; although the remainder of the letter contains directions for making the gun, and is not stamped as an agreement. *Forsyth v. Jarvis*, 437

28. *A.* states to the father of the plaintiff that he has pledged himself to marry his daughter in six months, or in a month after *Christmas*. Although this varies from the promises laid in the special counts, it is evidence from which the jury may infer a promise to marry generally. *Potter v. Deboos*, 82

EXAMINATION OF WITNESS.

1. A witness called to prove that *A.* and *B.* are partners, is asked whether *A.* has interfered in the business of *B.*, this is not a leading question. *Nicholls v. Dowding*, 81

2. The counsel for the plaintiff may suggest to the witness called, to prove the partnership of several members of a firm who are plaintiffs, the names of the component members of the firm. It is not sufficient to prove the several surnames, without proving also the christian names of the members of the firm, as stated in the declaration. *Acerro v. Petroni*, 100

EXECUTION.

See SHERIFF, BANKRUPT, &c.

Goods seized and sold by the landlord under a distress for rent without any collusion, and purchased by a trustee of the tenant's estate under an assignment by such tenant, for the benefit of the creditors, out of the trust funds, are not liable to be taken in execution by an annuity and judgment creditor, although they are permitted by the trustees to remain in the possession of the tenant. *Gutbrie v. Wood*, 367

EXECUTOR.

See ADMINISTRATOR.

FELONY.

A deed by which a felon, on the eve of his trial for a capital offence, assigns his property to another, cannot be supported without proof of consideration. *Shaw v. Bran*, 319

FOREIGN JUDGMENT.

If a colonial court has a seal which is used occasionally, a judgment cannot be given in evidence which is not under the seal of the Court, although the seal has been so much worn as to be incapable of making an impression, and it is not sufficient to produce a document purporting to

to be a judgment under the hand and seal of *A.* who is certified by *B.* a notary public, to be the chief clerk of the Court; *B.* being proved by a certificate from the governor under the great seal of the colony, to be a notary public. *Cavan v. Stewart*, 525

A judgment and execution in the island of *Jamaica* by a third party against the defendant as the garnishee of the plaintiff, cannot be set up as a defence to an action by the plaintiff here without either shewing that the plaintiff was summoned, or at least that he was once upon the island, although in the proceedings the plaintiff is denominated an *absentee*. *ib.*

FORGERY.

A forged order for the purpose of obtaining a reward for the apprehension, &c. of a vagrant is not a forgery within the st. 7 G. 2. c. 22, unless it contain the requisites prescribed by the st. 17 G. 2. c. 5. s. 5, although it is drawn in the same form as orders in that county usually have been drawn. *Rex v. Rushworth*, 396

FORM OF ACTION.

A. having recovered damages against *B.* for driving hold-fasts into *A.*'s wall, in order to support a nuisance brings a second action of trespass for the continuance.

Semble, the form of the second action should be case and not trespass. *Lawrence v. Obee*, 22

FRAUD.

The agent of the vendor of a picture knowing that the vendee labours under a delusion with respect to the picture, which materially influences

his judgment, permits him to make the purchase without removing that delusion—the sale is void. *Hill v. Gray*, 434

FRAUDS, STATUTE OF.

1. A written proposal to pay a moiety of the debt of another, if the creditor will at a specified time of meeting accept the proposal and discharge the debtor, is not binding, unless the creditor accede to the terms in writing. *Gaunt v. Hill*, 10
2. An agreement to occupy lodgings at a yearly rent, payable in quarterly portions, (the occupation to commence on a future day,) is an agreement relating to an interest in land, within the meaning of the fourth section of the Statute of Frauds. *Inman v. Stamp*, 12
3. *A.* having commenced certain business for *B.* which he has undertaken, refuses to proceed without a promise from *C.* to pay the further expences, *C.* is not liable on such a promise without a note in writing. *Barber v. Fox*, 270

FRAUDULENT REMOVAL.

Although double the value of goods fraudulently removed to prevent a distress, does not exceed 50*l.*, it is competent to the party injured to proceed either by action or in a summary way before a magistrate. *Horsefall v. Davy*, 169

And the fact of his having, in the first instance, made his complaint before a magistrate, will not preclude him from afterwards maintaining an action. *ib.*

FRAUDULENT PREFERENCE.

See BANKRUPT.

FRIENDLY.

FRIENDLY SOCIETY.

A friendly society whose rules have been allowed by the magistrates, and registered in *London*, afterwards hold their meetings in *Middlesex*, the justices of *Middlesex* have jurisdiction to decide upon complaints made by members of the society. *Rex v. Gash*, 441

Upon a complaint made by an excluded member, *A.* and *B.*, the then stewards, are duly summoned, and an order is made by two justices that such stewards and other members of the society shall forthwith reinstate the complainant. The order is served upon *A.* and *B.* after they have ceased to be stewards; but it is still obligatory upon them, as members of the society, to attempt to reinstate the complainant, and their having ceased to be stewards is no justification of entire neglect on their part. *ib.*

GUARANTEE.

1. An agent in this country for merchants the sellers of goods in *Russia*, who guarantees "that the shipment shall be in conformity with the revenue laws of *Great Britain*, so that no impediment shall arise upon the importation thereof, or that in default, the consequence shall rest with the sellers," makes himself personally responsible to the buyer. *Redbead v. Cator*, 14
2. An impediment arising from non-compliance with the Navigation Act, is an impediment within the terms of the guarantee. *ib.*
3. Such a guarantee is not within the Statute of Frauds, if the terms of the agreement can be collected from the written correspondence between the parties. *ib.*
4. *A.* engages to guarantee the amount

of goods supplied by *B.* to *C.* provided 18 months' credit be given, if *B.* give credit for 12 months only, he is not entitled at the expiration of six months more, to call upon *A.* on his guarantee. But *B.* having after the commencement of the action delivered an invoice, from which it appears that credit was given for 12 months only, is at liberty to shew that this was a mistake, and that in fact 18 months' credit was given. *Bacon v. Cherney*, 192

HIGHWAY.

The inhabitants of a parish plead that the inhabitants of a particular district are bound by prescription to repair all common highways situate within that district, save and except one common highway within the said district, the plea may be supported, although it appear that the excepted highway is of recent date. *Rex v. Inhabitants of Ecclesfield*, 393

In such a plea it is unnecessary to state by whom the excepted highway is repairable. *ib.*

HUNDRED.

Proof that the mob, after breaking open the door, tearing down the window-frames, and doing other serious damage to a house, were interrupted in their proceedings by a military force, is evidence from which a beginning to demolish (in an action against the hundred) is to be presumed; but if the mob after committing such mischief voluntarily retire, without proceeding to demolition, it is a question for the jury, whether there was a beginning to demolish. *Lord King v. Chambers and Another*, 195

INCLOSURE.

A party who has enjoyed an encroachment

ment upon a common for more than twenty years, is not precluded from shewing such enjoyment, when his title is disputed, by having subsequently accepted a conveyance of contiguous land, in which the land in dispute is described as *waste land*. *Doe d. Bishop of London, &c. v. Wright*, 349

INDICTMENT.

1. If the description of a highway in an indictment for the non-repair of it be too indefinite, being equally applicable to several highways, advantage should be taken by plea in abatement, and the description given, if true in fact, cannot be objected to at the trial under the plea of the general issue. *Rex v. Inhabitants of Hammer Smith*, 357
2. An indictment will not lie for a deceitful representation and warranty of the soundness of a horse. *Rex v. Pywell*, 403
3. Upon an indictment for winning more than 10l. at one sitting, &c. under the statute 9 Ann. c. 14. s. 5. the defendant may be convicted of winning a less sum than that stated in the indictment. *Rex v. Hill Darley*, 359
4. The Court will not grant a new trial after a defendant has been acquitted upon an indictment, although the acquittal was founded upon a misdirection by the judge. *Rex v. Cohen and Jacob*, 516

INN OF COURT.

Under a bond conditioned for the due payment to the society of Lincoln's Inn, all such sums as should from time to time become due and payable, according to the *customs* and *orders* of the society; the obligor cannot dispute such payments as

were at the time of the execution of the bond, considered as dues to the society. *Earl of Rosslyn v. Jodrell*, 147

INNKEEPER.

1. If a guest at an inn deposit his goods in a room, which he uses as a warehouse, and of which he has the *exclusive possession*, the innkeeper is not liable for the loss. *Farnworth v. Packwood*, 249
2. An innkeeper, though licensed to let post-horses, is not liable to an action for refusing to supply them for a guest. *Dicas v. Hides*, 247
3. The master of an hotel is not responsible for the washing of the linen of the guests at his house. *Callard v. White*, 171

INSURANCE.

1. Goods having been detained by a foreign power are afterwards restored—as between the assurer and the assured—a yielding up of the goods *quasi in integro* is to be considered as a restoration, notwithstanding some spoliation during the detention. *Jordaine v. Cornwall*, 6
2. A voyage from *Riga* to *Hull* is commenced before a licence has been obtained, which is necessary to legalize the voyage, but under a reasonable expectation that a licence has been obtained; an insurance having been effected here by an agent in *England*, after a licence had been obtained, the assured is entitled to a return of premium. *Henry v. Staniforth*, 254
3. A licence is granted to *A.* and *B.* for permitting vessels bearing any flag to import certain specified articles; in order to shew the legality of the voyage in an action against an insurer, it is sufficient to shew that

- that the licence has been applied to the ship and voyage in question, without further connecting the plaintiff with *A.* and *B.* to whom the licence was granted. *Butler v. Alnutt*, 222
4. If articles not specified in the licence be imported along with others which are specified, (*semble*,) the licence will still enure to the protection of those articles which are specified.—The licence having been deposited in the custom-house and accidentally destroyed, it is to be presumed, that the time of clearance, as required by the order in council, was indorsed upon it, upon its being shewn, that without such indorsement, the custom-house would not have permitted the entry to have been made. *Butler v. Alnutt*, 222
5. A merchant ship (under a mistake) is taken in tow by a *British* ship of war, and is thereby exposed to a tempestuous sea, which injures goods on board of her, this is a loss from the perils of the sea;—but *semble*, since the loss resulted from restraint by a ship of war, it might have been alleged to have been occasioned by capture and detention. *Hagedorn v. Whitmore*, 157
6. By the terms of the policy, the underwriter binds himself to pay average separately, on each particular package of the goods insured, this stipulation does not preclude the assured from recovering an average loss upon the whole exceeding three *per cent.* under the usual clause in the policy. *ib.*
7. And in such case, although several packages remain uninjured, they are to be included in the average. *ib.*
8. An insurer, who desires the assured to do what he conceives to be the best under the circumstances, is bound by what the latter does in the exercise of a sound discretion, 157
9. A policy is effected on the plaintiff's share of goods, valued at 500*l.* but upon its turning out that the plaintiff's interest was larger, the words are added in the margin of the policy on the plaintiff's share of goods, say one-fifth, valued at 1000*l.* to which the defendant's initials were subscribed, the declaration need not notice the original stipulation. *Robinson v. Tobin*, 336
10. To constitute a stranding, it is essential that the vessel should be stationary, the striking on a rock, where the vessel remains for a minute and a half only, is not a stranding, though she thereby receives an injury, which eventually proves fatal. *Macdougale v. The Royal Exchange Assurance Company*, 130
11. An averment of loss by perils of the seas, is not supported by proof that the vessel was sunk in consequence of being fired upon by another vessel under a mistake. *Cullen v. Butler*, 138
12. An insured vessel arrivés at the port of *Kinsale* on the 24th of *November*; on the 14th of *December*, a second survey is had, when it is found that the expences of the repairs will exceed the value of the ship, notice of abandonment to the insurers in *London* on the 6th of *January* is too late. *Aldridge v. Bell*, 498
13. A vessel strikes upon a rock and remains fixed there for the space of fifteen or twenty minutes, in consequence of which she sustains a material injury. This constitutes a stranding. *Baker v. Towry*, 436
14. An insured vessel is warranted to carry a *French* licence, it is not sufficient to shew that the captain of the vessel in 1813, before the vessel sailed

sailed from *Dantzic*, received a document which purported to be a *French* licence, without shewing that he received it from some officer or person in authority under the *French* government; but proof that after the arrival of the vessel at *Bordeaux*, she was allowed to remain there for upwards of a month after an inspection of the *French* licence and other documents by the officer of the *French* government, is *prima facie* evidence that the document is genuine. *Everth v. Tunno*, 508

INTEREST.

1. The plaintiff in an action of debt on a judgment recovered in *Jamaica*, is not entitled to recover interest. *Atkinson v. Lord Braybrook*, 219
2. In an action to recover interest on monies advanced to the defendant by a banking-house, it is not sufficient to shew that it was the general custom of the house to charge interest calculated upon half-yearly rests, without shewing also that the defendant knew that such was the practice. *Moore v. Voughton*, 487
3. A bond conditioned for the payment of a specified sum to *A.*, after the death of *B.* and *C.*, and the survivor of them, will bear interest after the death of *B.* and *C.*, although the engagement was perfectly voluntary. And although the principal was payable on a contingency. - *Hellier v. Franklin*, 291

One issue in such case having been taken on the plea of payment, according to the condition of the bond, the defendant is not entitled to a verdict on that issue, on proof of payment of the principal without interest.

Qu. Whether in such case after payment of the principal, an action

can be maintained for the interest only. 291

LANDLORD AND TENANT.

An agreement between landlord and tenant that the latter shall be at liberty to quit at *Lady-day* 1814, in which event the former undertakes to take the fixtures at a valuation, or to permit the tenant to let the house to a respectable tenant, creates an option to be exercised by the tenant, in case he gives up the premises.

A letting by the tenant to an under-tenant till *Lady-day* 1814, is not an exercise of his right of option. *Colton v. Lingham*, 39

LEASE.

A lease contains a proviso for re-entry, in case the rent shall be twenty-one days in arrear, and there shall be no sufficient distress on the premises; the landlord, who distrains before the expiration of the twenty-one days, but continues in possession of the distress upon the premises until after the expiration of twenty-one days, does not thereby waive his right of re-entry. *Doe d. Taylor v. Johnson*, 411

LIBEL.

In an action for a libel contained in a letter transmitted by the defendant to the plaintiff, by means of a third person, it is a question for the jury whether there has been any publication of the libel, except to the plaintiff himself, and if there has not, the defendant is entitled to their verdict. *Clutterbuck v. Chaffers*, 471

LIEN.

1. *A.* having repaired a carriage for *B.*, allows him to take it away from time to time

to time; he cannot afterwards detain it for the amount of the repairs: neither can he detain it upon a claim for standage, without an express contract to pay for standage, or unless the owner leaves it upon the premises beyond a reasonable time after notice. *Hartley v. Hitchcock*,

408

2. *A.* at *Bristol* sells goods to *B.* to be paid for by *B.*'s acceptance of a bill to be drawn by *A.*: the goods are weighed, but remain in *A.*'s warehouse, who omits to draw the bill. *B.* sells a specific and ascertained portion of these goods to *C.* in *London*, who pays for them and transmits *B.*'s order to *A.* for the delivery of them. On the fourth day after *A.*'s receipt of the order, *B.* becomes bankrupt, and then, and not before, *A.* refuses to deliver the goods to *C.*, insisting that he has a lien upon them for the price. — *C.* may maintain trover against *A.*; for he was bound at all events to notify his refusal immediately. *Green v. Haythorne*,

447

And (*semble*) having neglected to draw the bill, and having furnished *B.* with samples to go into the market with, and having obeyed several orders of *B.*'s for the delivery of portions of the goods to different sub-vendees, he could not have insisted upon any lien, even if he had given immediate notice. *ib.*

3. *A.* whilst he is solvent and resident at *Calcutta*, directs *B.* at *Bombay* to remit certain proceeds to *C.* in *England* who is in the habit of accepting bills for *A.*, this order is executed by *B.* without fraud, but after an act of bankruptcy committed by *A.*; *C.* has a lien on the sum received for his balance. *Assignees of Jamieson v. Hodson*,

150

4. In an issue out of chancery to try

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a question of *lien*, the term is to be understood in its legal sense, which imports an authority either to possess or to retain. *Assignees of Holland v. Assignees of Humble*,

143

An order by *A.* to *B.*, directing the latter to pay over to *C.* a creditor of *A.*'s, the proceeds of a cargo consigned by *A.* to *B.*, creates no lien in favour of *C.* *ib.*

LIMITATIONS, STATUTE OF.

1. A qualified admission by a party who relies on an objection, which would at any time have been a good defence to the action, does not take a case out of the Statute of Limitations. *De la Torre v. Barclay*,

7

2. In order to take a case out of the Statute of Limitations in an action on a promissory note, it is not sufficient to shew a payment by a joint maker of the note to the payee within six years, so as to throw it upon the defendant to shew that the payment was not made on account of the note. *Holme v. Green*,

488

An acknowledgment by one partner to bind another in such case must be clear and explicit. *ib.*

MALICIOUS ARRESTS, PROSECUTIONS, &c.

1. Averment in an action for a malicious arrest, that the defendant detained the plaintiff *until he found bail*. If some detention be proved, it is sufficient to support the action, although no bail was put in. *Bristow v. Heywood*,

48

2. An averment that the suit is wholly ended and determined, is evidenced by proof of the rule to discontinue upon payment of costs, and that the costs were taxed and paid. *ib.*

3. *A.* having by his laches lost all right of

- a society. *A.* (who are partners,) after notice by *A.* that he will not be answerable for any goods subsequently sent, it is incumbent on the plaintiff, in an action for the amount of such goods, to prove some act of adoption on the part of *A.*, or that he has derived benefit from the goods. *Willis v. Dyson*, 164
- 405 of exchange in a lot of cattle, himself and *B.*, *B.*, and *B.* in being dishonoured to *A.* will take it cannot whilst un- 8
9. Assumpsit against four, three of whom have been outlawed; an admission by the fourth, that he was in partnership with the other three, is evidence as against that fourth, of a joint promise by all the four. *Sangster v. Mazarredo*, 162
- After the actual dissolution of a partnership between *A.* and *B.*, *A.* accepts a bill in the name of the partnership, bearing date before the dissolution, an indorsee who takes the bill without notice of the dissolution, cannot enforce the bill against *B.* *Wrightson v. Pullan*, 375
11. A written notice of the dissolution of a partnership reciting the dissolution, and signed by the parties in order to its insertion in the *Gazette*, may be read in evidence to prove notice of the dissolution, although it has not been stamped. *Jenkins v. Blizard*, 418
12. Proof of the insertion of such notice, although but once in a newspaper taken in by the party sought to be affected by the notice, and left at his house in the usual course, is evidence to be left to a jury, without strict proof that the paper ever reached the party. But the most usual and prudent course in such cases is to give notice by a circular letter. *ib.*
- PATENT.
1. In the specification of a patent for an improved instrument, it is essential to point out precisely what is new and

of action on a note indorsed by *B.*, arrests *B.*, and afterwards discontinues the action, these circumstances do not of themselves so exclude all probable cause as to afford a presumption of malice, 48

4. Averment that *A.* before a magistrate maliciously charged *B.* with felony; the information contains a mere charge of tortious conversion upon which a warrant for felony was improperly founded; the variance is fatal. *Tempest v. Chambers*, 67

5. A declaration in an action for a malicious prosecution, which alleges that the defendant charged the plaintiff with felony, is supported by evidence that the defendant stated to the magistrate that he had been robbed of specific articles, and that he suspected and believed, and had good reason to suspect and believe, that the plaintiff had stolen them. *Davis v. Noak*, 370

6. A plaintiff, who, acting under what he conceives to be sound advice, takes the defendant in execution, after he has taken the defendant's bail in execution, is not liable to an action for maliciously arresting the defendant, although previous to the arrest, he had notice from the defendant that his proceeding was illegal. *Snow v. Allen*, 502

MALICIOUS STABBING.

In order to bring an offender within the clause of the st. 43 G. 3. c. 58. s. 1. for stabbing with intent to resist a lawful apprehension by a private person, for cutting a third person, it is essential that the person apprehending should have been present at the commission of the offence, or that he should be armed with the authority of a warrant. *Rees v. Dyson*, 246

MEDICAL BROKERAGE.

See AGREEMENT.

NAVIGATION ACT.

A vessel not actually built in *Russia*, but repaired there at an expence exceeding two-thirds of the whole value, is not of the built of *Russia* under the Navigation Act, although she is so considered by the laws of *Russia*. *Redbead v. Cator*, 14

NEGLIGENCE.

See COACH-OWNER. ACTION ON THE CASE.

NOTICE.

Service of notice on the wife of the defendant's attorney at his lodgings, to produce a lease, on the evening before the trial is insufficient. *Doe d. Watney v. Grey*, 283

PARTNERSHIP.

1. A father who holds out to the world that his son is his partner, and who sends bills, and signs receipts in their joint names, in an action brought in his own name, is not precluded from shewing that his son is not a partner. *Glossop v. Colman*, 25
2. In an action against one of several members of a society established under a deed of copartnership, for goods supplied to the society, the defendant may be proved to be a partner by parol evidence, without producing the deed. And the entries in a book containing a record of the proceedings of the society, produced at the meetings, and open to the inspection of all the members, are admissible in evidence against the defendant after he has been proved to be

- be a member of the society. *Al-*
derson v. Clay, 405
3. *A.* receiving a bill of exchange in payment for part of a lot of cattle, jointly purchased by himself and *B.*, indorses the bill to *B.*, and *B.* indorses it over, the bill being dishonoured, *B.* promises to pay to *A.* half of the amount if he will take it up: *A.* after taking it up cannot maintain an action against *B.*, whilst the partnership account remains unliquidated. *Robson v. Curtis,* 78
 4. *Prima facie* evidence of a partnership having been given, the declaration of one partner is evidence against another partner. *Nicholls v. Downing,* 81
 5. By the terms of a deed of copartnership, a house is to be used and occupied by the copartners during the copartnership. After a dissolution of partnership, no notice to quit is necessary previous to an action of ejectment against a copartner. Notice by a copartner that the partnership *has been dissolved*, is evidence as against him, that it has been dissolved by competent means, and therefore is evidence of a dissolution by deed, if a deed be essential to such dissolution. *Doe d. Waithman v. Miles,* 181
 6. *A.* and *B.* are partners, and also copart-owners of a vessel, an admission by *A.* as to a subject of copart-ownership, but not of copartnership, is not admissible against *B.* *Jagers v. Binings,* 64
 7. *A.* knows that an intention between *B.* and *C.* to dissolve their partnership is in the course of execution, if *A.* afterwards insist upon the continuance of the partnership, it lies upon him to shew that the intention has been abandoned. *Patterson v. Zachariah,* 71
 8. Goods are supplied to *A.* and *B.* (who are partners,) after notice by *A.* that he will not be answerable for any goods subsequently sent, it is incumbent on the plaintiff, in an action for the amount of such goods, to prove some act of adoption on the part of *A.*, or that he has derived benefit from the goods. *Wilks v. Dyson,* 164
 9. Assumpsit against four, three of whom have been outlawed; an admission by the fourth, that he was in partnership with the other three, is evidence as against that fourth, of a joint promise by all the four. *Sangster v. Manarredo,* 162
 10. After the actual dissolution of a partnership between *A.* and *B.*, *A.* accepts a bill in the name of the partnership, bearing date before the dissolution, an indorsee who takes the bill without notice of the dissolution, cannot enforce the bill against *B.* *Wrightson v. Pullan,* 375
 11. A written notice of the dissolution of a partnership reciting the dissolution, and signed by the parties in order to its insertion in the *Gazette*, may be read in evidence to prove notice of the dissolution, although it has not been stamped. *Jenkins v. Blizard,* 418
 12. Proof of the insertion of such notice, although but once in a newspaper taken in by the party sought to be affected by the notice, and left at his house in the usual course, is evidence to be left to a jury, without strict proof that the paper ever reached the party. But the most usual and prudent course in such cases is to give notice by a circular letter. *ib.*

PATENT.

1. In the specification of a patent for an *improved* instrument, it is essential to point out precisely what is new and

and what is old, and it is not sufficient to give a general description of the construction of the instrument without making such distinction, although a plate is annexed, containing a detached and separate representation of the parts in which the improvement consists. *Macfarlane*

v. Price, 199

2. A patent for an improved mode of lighting cities, towns, and villages, is not supported by a specification describing an improved lamp. *Lord Cochrane v. Smetburst,* 205

3. A patentee in the specification sums up the principle in which his invention consists; if this principle be not new, the patent cannot be supported, although it appear that the application of the principle, as described in the specification, is new. *Rex v. Cutler,* 354

PAYMENT.

1. Payment of money secured by bond, is not to be presumed, although more than 20 years have elapsed since an acknowledgment that any sum was due upon it, if the obligee ever since that acknowledgment has resided abroad. *Newman v. Newman,* 101

2. A payment by the obligor of a bond to the obligee, to whom the obligor is also otherwise indebted, cannot, without some circumstances to shew that it was intended to be made in discharge of the bond, be so applied in favour of the surety of the obligor in an action upon the bond under the plea of payment. *Plomer v. Long,* 153

PAWNBROKER.

One employed to sell goods by commission pawns them; the owner of the goods may maintain trover

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against the pawn-broker, after a demand and refusal, although the duplicate has not been tendered under the statute 39 & 40 G. 3. c. 99. *Pest v. Baxter,* 472

PERJURY.

1. In an indictment for perjury alleged to have been committed in the defendant's answer to a bill of discovery filed in the *Exchequer*, it is alleged that the bill was filed on a day specified. The day is not material where it is not alleged as a part of the record, and therefore there is no variance, although the bill, when produced, is found to be entitled generally of a preceding term. *Rex v. Hucks,* 521

2. In an assignment of perjury it is alleged, that the defendant, at the time of effecting a policy of insurance purporting to have been under-written by *A., B., C.* and others, on a day specified, well knew, &c. on producing the policy, it appears that *A.* underwrote the policy on a different day, the defect is fatal, although it appears that *B., C., &c.* did underwrite the policy on that day. *ib.*

3. In an indictment for perjury it is alleged, that *Francis Cavendish Aberdeen* and Others, exhibited their bill in the *Exchequer*, &c. on the production of the bill, it purports to be the bill of *J. C. Aberdeen* and Others, (whose names were specified,) this is no variance, and it may be proved that this was the bill of *Francis Cavendish Aberdeen*. And there is no variance, although after this allegation, and after setting out such parts of the bill as are necessary, the words are added "as appears by the said bill, &c. filed of record." *Rex v. Roper,* 518
And

And although the answer in the indictment is alleged to be entitled the answer of the defendant to the bill of complaint of *J. C. Aberdeen*, the conviction is sustainable although the title of the answer varies from the allegation as to the exhibiting of the bill. *Rex v. Roper*, *Addenda*.

4. If a coplaintiff die, the suit will be abated, unless the death be suggested according to the stat. 8 & 9 W. 3. c. 11. s. 6. And therefore if a coplaintiff die after issue joined, a trial without such suggestion on the record, would be extra-judicial; and consequently no perjury could be assigned upon any false evidence given at such trial. *Rex v. Cohen*, 511

PENAL ACTION.

1. After the plaintiff's case has been closed, the court will not allow him to remedy a defect in his evidence, unless it has occurred from inadvertency on the part of his counsel. *Allred v. Halliwell*, 117
 2. A declaration under the st. 49 G. 3. c. 126. s. 6., alleges that the defendant advertised a proposal for a promise to give the sum of 150 guineas, to any one who would procure *A. B.* a place under government; the words for a promise, may be rejected as surplusage. *Clarke v. Harvey*, 92
- The words under government are sufficient, though the words of the statute are, "office in the gift of the crown."

PETITIONING CREDITOR.

A messenger cannot recover against the petitioning creditor the expences of an unnecessary and fruitless journey to the *Isle of Man*, without

specific authority from the petitioning creditor. *Billings v. Waters*, 363

PLEADING.

1. Under an allegation by way of special damage, that the plaintiff had thereby lost divers lodgers (without naming any), he cannot prove the loss of a particular lodger. *Westwood v. Cowne*, 172
2. A plea *puis darrein continuance*, will be received when tendered at Nisi Prius, if it bear the form and semblance of a plea; but in order to prevent vexatious delay, the Court will order a demurrer to such a plea, to stand for the first paper day in term. *Fitch v. Toulmin*, 62
3. Where different lots are sold at an auction for different sums, the contracts are separate, both in law and fact.—And in a special action for refusing to adhere to the conditions of sale, the plaintiff cannot consolidate the two contracts. *James v. Shore*, 426
4. A general allegation in an action for a penalty for acting as a magistrate without a qualification, following the words of the statute, without specifying any particular act, is good after verdict. *Wright v. Horton*, 400

POWER, EXECUTION OF.

An estate is settled to the use of such person, &c. as *J. B.* shall by any writing, &c., signed, sealed and delivered by him, in the presence of two or more witnesses, direct, limit, and appoint. *J. B.* may execute this power by his will, signed, sealed and delivered in the presence of three witnesses. *Doe d. Delegal v. Holloway*, 431

POWER OF ATTORNEY.

A power of attorney authorizing the sale of a vessel, is revoked by the death of the owner. *Watson v. King*, 121

PRACTICE.

If a counsel in opening for the plaintiff, read a letter of the defendant's merely as introductory of the plaintiff's case, the letter is not to be considered as given in evidence by the plaintiff, but must be afterwards proved by the defendant as part of his own case, if he mean to rely upon it; *aliter* if the plaintiff's counsel read it as part of the plaintiff's case. *Willis v. Dyson*, 164

PRINCIPAL AND AGENT.

A. in London consigns goods to the firm of *B.* and *C.* at *Hamburg* for sale upon a *del credere* commission, *B.* in London makes advances to *A.* to be repaid out of the proceeds. — *B.* and *C.* with the proceeds purchase bills for *A.* which they transmit to *B.* in London, specially indorsed to him, and these bills, whilst they are in *B.*'s hands, are dishonoured. *B.* and *C.* must bear the loss. *Lucas and Others v. Groning and Others*, 391

1. If the agent to whom goods have been consigned by his principal for sale, refuse, after a reasonable time has elapsed, to account for them, it is to be presumed that the agent has sold them. *Hunter v. Welsh*, 224
2. And in such case a bill of particulars, stating the demand to be for the goods, (which it specifies,) and for money had and received, &c. is sufficient. *ib.*

PUBLIC COMPANY.

A company which has been entrusted by the legislature with the execution

of a power from which mischief may result to the public, is bound to take especial precaution to guard against such mischief, and in default is responsible in damages. *Weld v. The Gas Light Company*, 189

SCHOOLMASTER.

A schoolmaster who permits an infant pupil under his care to make use of fire-works, is responsible in an action for the mischief which ensues. *King v. Ford*, 421
 But if the declaration allege that the defendant (in such an action) delivered the fire-works to the pupil, and caused and procured them to be delivered to him, and it turn out, that although the defendant had permitted the use of fire-works by his pupils, that the fire-works from which mischief resulted had, in fact, been delivered to the pupil by another person, without the authority or knowledge of the defendant, the variance will be fatal. *ib.*

SET-OFF.

1. Covenant — plea *non est factum*, the defendant cannot give evidence of set-off, under a mere notice without plea.

The plea of *non est factum* is not a general issue. *Oldershaw v. Thompson*, 311

2. Where by the custom of the hat trade the amount of the injury sustained by the hats in the process of dyeing is always to be deducted from the charge for dyeing, the defendant is entitled to such deductions in an action brought by the dyer, without giving any notice of set-off, and although there has not been any previous adjustment of the amount of the damage. *Bamford v. Harris*, 343

SHERIFF.

SHERIFF.

1. A sheriff having seized goods under a *fi. fa.* which he retains in his hands, conceiving that the sale made by his broker is fraudulent, is not justified in returning that the goods remain in his hands for want of purchasers. — He ought in such case to apply to the Court for further time, on the ground of the special circumstances.

But (*semble*) in an action for a false return under these circumstances, the inadequate price offered is the proper measure of damages. *Barnard v. Leigh and Another*, 43

2. An action on the case does not lie against a sheriff (who has not been ruled to return the writ) for neglecting to have the money in court according to the exigency of a *feri facias*. *Moreland v. Leigh*, 388
3. In order to charge the sheriff with the act of the bailiff in an action for extortion, it is not sufficient to produce a copy of the precept, with the bailiff's name indorsed upon it, although the sheriff has returned *cepi corpus*: the plaintiff in such case must either produce the warrant, or prove some recognition of the act of the bailiff by the sheriff.
4. But it is not essential in such case to produce the warrant, the privity between the sheriff and the bailiff may be proved, by shewing, that upon the arrest a bail bond was executed and delivered to the bailiff, who returned it to the sheriff, upon which the latter made his return of *cepi corpus*. *Martin v. Bell and Another*, 413
5. A sheriff having returned to a writ of *fi. fa.* that he has seized and sold part, and that the residue remains in his hands for want of buyers, may shew, upon an action brought for

not having the money in Court, &c. that the goods were in fact the property of the assignees of the defendant who had become a bankrupt. *Brydges v. Walford*, 389 n.

6. An action for money had and received at the suit of a plaintiff who has sued out a *feri facias* lies against the sheriff who executed it, if he retain more money in his hands than he is entitled to do, the party injured not being bound to proceed by motion in Bank. *Longvill v. Jones*, 345

SHIP.

1. The owner of a vessel is liable for money supplied to the captain in a foreign port, provided the supply be absolutely necessary for the use of the vessel. *Rocher v. Busber*, 27
2. A mere literal deviation from the form of a conveyance of a ship prescribed by the act will not render the conveyance void. *Taylor v. Kinloch*, 175
3. *A.* having shipped goods on board of a vessel which is driven into a foreign port by stress of weather, part of these goods is sold by the captain to defray the expences of repairing the vessel. *A.* is entitled to deduct from the demand, for freight, the sum for which the goods have been sold. — And the circumstance of the ship-owners having, during the voyage, assigned the freight to a third person, makes no difference. *Campbell v. Thompson*, 490
4. The master of a vessel is not justified in selling any part of the cargo for the repairs of a ship in a foreign port, except in cases of urgent necessity. *ib.*
5. A part owner of a vessel who orders supplies on his own account, without mentioning any copart-owners,

owners, cannot plead in abatement that there are copart-owners who ought to have been joined, the plaintiff being ignorant that there were other part-owners. *Baldney v. Ritchie*, 338

6. Notice to the defendant to produce an order relating to the ship, which it appears the defendant has delivered to the captain, is sufficient (in default of production) to enable the plaintiffs to give parol evidence of the order, since the possession of the captain, is for this purpose the possession of the defendant. *ib.*
7. A mere mortgagee of a ship, who does not take possession, is not liable for necessaries supplied for the use of the ship previous to a re-transfer. *Twentyman v. Hart*, 366
8. The owner of a ship is liable for stores and necessaries supplied by the order of the supercargo, after the detention and liberation of the vessel by a foreign power, although the supplies are afforded after an abandonment by the owner to the underwriters. And although the supplies are furnished for the purpose of enabling the vessel to prosecute a second voyage, in the prosecution of which she is seized by *British* officers and confiscated, yet the institution of proceedings in the Admiralty Court by the defendant to recover possession of the vessel, amounts to an adoption of the second voyage, and renders him liable for the amount. *Mitchell v. Glennie*, 230

SLANDER.

1. Action for words imputing a crime; an agreement on the part of the plaintiff, to waive his action for words spoken, in consideration that the defendant will destroy certain

documents in his possession, or which might afterwards come into his possession, imputing the same crime to the plaintiff, is (when executed by the burning of the papers in his possession) a bar to the action, and may be given in evidence under the general issue. *Lane v. Applegate*, 97

2. An averment that slanderous words were spoken concerning the (three) plaintiffs in their joint trade, is not supported by evidence of words addressed by the defendant personally to one only of the partners. *Solomons and Others v. Medex*, 191
3. Words imputing felony, but spoken with reference to such warrant, and not intended to convey a substantive charge, are not actionable. *Tempest v. Chambers*, 67

SPECIAL JURY CAUSES.

Rule as to the appointment of, 81

STAMP.

1. Against a party who refuses (after notice) to produce an agreement, it is to be presumed that it is stamped. But the party refusing is at liberty to prove the contrary. *Crisp v. Anderson*, 35
2. The plaintiff having signified by a printed prospectus the terms on which he is ready to engage to perform particular services, may in an action against one who has employed him to render those services under a parol agreement, read the printed prospectus to shew what the terms were, although it is not stamped. *Edgar v. Blick*, 464
3. A bond given for the purpose of securing certain conditions to be performed by the vendor of a house, requires a 20s. stamp only, and not an *ad valorem* stamp. *Hughes v. King*, 119
4. A

4. A deed by which the plaintiff covenants to give up his trade to the defendant, and to allow him to carry it on in his house for ten years, the defendant paying 1000*l.* for the fixtures, &c. at the time of executing the deed, and covenanting to pay 1000*l.* *per annum* for ten years, does not require an *ad valorem* stamp. *Lyburn v. Warrington*, 162

STOCK.

See AGREEMENT.

SUBSCRIBING WITNESS.

See ATTESTING WITNESS.

TENDER.

After a tender of what is due from two persons on a joint contract, a subsequent application to one of them is sufficient to support a replication to a plea of tender, that the plaintiff subsequently demanded payment from the defendants. *Pearse v. Bowles*, 323

TRESPASS.

1. In trespass *quare clausum fregit*, laid to have been committed on a particular day, and on divers other days and times between that day and the exhibiting of the bill, &c. The plaintiff may prove an act of trespass anterior to the day specified, but he will be confined to that single act. *Hume v. Oldacre*, 351
2. In an action of trespass against a huntsman for hunting over the lands of another, damages may be recovered, not only for the mischief immediately occasioned by the defendant himself, but also for that done by the concurrence of people who accompanied him. *ib.*

USE AND OCCUPATION.

1. In an action for the use and occupation of a house for six months, it is *prima facie* sufficient for the plaintiff to shew an occupation of the house by the defendant, as his tenant, for the preceding six months, since the continuance of the tenancy is to be presumed until the contrary appear. *Harland v. Bromley*, 455
2. And it is not sufficient in such case for the defendant to prove that the keys had been previously delivered to a servant at the plaintiff's house, and a subsequent declaration on the part of the plaintiff that the keys had been lost or mislaid. *ib.*

VARIANCE.

See FORGERY, ASSUMPSIT.

VENDOR AND VENDEE.

1. The vendee of a merchantable commodity warranted to be of the best quality, proceeds to use it from time to time till the whole has been consumed, when the value of the article can no longer be ascertained, having given no notice to the vendor during this time of any defect in the article, and having deprived the vendor of the means of proving the value of the article by proper tests, the vendee is not entitled to recover on the ground of any alleged defect in the article. *Hopkins v. Appleby*, 477
2. *A.* sells to *B.* a bowsprit which at the time of sale appears to be perfectly sound, but which, after being used some time, turns out to be rotten: in the absence of fraud *A.* is entitled to recover from *B.* what the bowsprit was apparently worth at the time of delivery. *Bluett v. Osborne*, 384
3. If

3. If the vendee of a ponderous article after reasonable trial finds that it does not answer the purpose for which it was ordered, the vendor after notice given is bound to take the article away; but if he neglect to give notice, the plaintiff is entitled to recover as much as the materials were worth. *Okell v. Smith*, 107

WARRANTY.

Goods sold are described in the invoice as *scarlet cuttings*, a warranty is to be inferred that the goods answered the known mercantile descrip-

tion of *scarlet cuttings*. *Bridge v. Wain*, 504

WITNESS.

A witness from the country on his arrival in *London* for the purpose of giving evidence in a cause which stands for trial during the sittings is arrested for debt, the proper course for obtaining his discharge is to bring him before a judge at chambers by writ of *Habeas Corpus*. *Ex-parte Tillotson*, 473

See ATTESTING WITNESS, EVIDENCE, &c.

THE END.





